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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 245

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY, A CORPORATION,

Petitioner,

vs.

BROTHERHOOD OF RAILROAD TRAINMEN, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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BROTHERHOOD OF RAILROAD TRAINMEN, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Elgin, Joliet and Eastern Railway Company prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above entitled case on May 3, 1962.

OPINIONS BELOW.

The memorandum of the district court (App. 467-70)[1] is reported at 196 F. Supp. 158, 166 (N. D. Ill. 1961). This memorandum contained two separate decrees, one dismissing the complaint and the other entering an injunction

[1] The Joint Appendix to the Briefs filed in the Court below contains the material relevant to present issues and will be cited "App. ....."

pending appeal. Separate appeals were taken from both decrees, and the court of appeals rendered two separate, but connected, opinions. These opinions of the court of appeals (Appendix A, *infra*, pp. A-1 - A-18), are reported at 302 F. 2d 540, 545 (7th Cir. May 3 and 4, 1962).

JURISDICTION.

The judgment of the court of appeals was entered May 3, 1962 (Appendix A, *infra*, pp. A-1 - A-8). Petition for rehearing was denied by the court of appeals on June 7, 1962. The jurisdiction of this court is invoked under 28 U. S. C. §1254 (1).

QUESTION PRESENTED.

Whether, when an appeal is immediately taken from a district court's holding that, under the Norris-LaGuardia Act, it is without jurisdiction to enjoin permanently a strike in a Railway Labor Act injunction suit brought by a railroad, the Norris-LaGuardia Act further withdraws the district court's judicial power, conferred by Article III of the Constitution and the All-Writs section of the Judicial Code, to enter an injunction of the strike pending appeal by the railroad, to maintain the *status quo* and preserve the case for decision by the court of appeals.

STATUTES AND RULES INVOLVED.

Sections 1, 4, 5, 7 and 9 of the Norris-LaGuardia or Anti-Injunction Act of 1932, 47 Stat. 70, 29 U. S. C. §§ 101, 104, 105, 107 and 109, are set forth in Appendix B hereto, *infra*, pp. B-1 - B-4. The All-Writs statute, 1 Stat. 73, 28 U. S. C. § 1651, provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Rule 62(c), F. R. Civ. P. provides:

> Injunction Pending Appeal. When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party. If the judgment appealed from is rendered by a district court of three judges specially constituted pursuant to a statute of the United States, no such order shall be made except (1) by such court sitting in open court or (2) by the assent of all the judges of such court evidenced by their signatures to the order.

STATEMENT.

Elgin, Joliet and Eastern Railway Company filed a suit on May 19, 1961, in the district court seeking to enjoin the Brotherhood of Railroad Trainmen, the Brotherhood of Locomotive Firemen and Enginemen and the Order of Railway Conductors and Brakemen (hereinafter "brotherhoods") from striking on the following day over certain collective bargining demands. The district court entered a temporary restraining order on May 19, 1961. This order was continued in effect by agreement pending final action by the court after a hearing on the merits. Such a hearing was held, and thereafter, on June 21, 1961, the court denied petitioner's application for a permanent injunction and dismissed the complaint.

The following day petitioner filed a notice of appeal to the court of appeals and contemporaneously applied to the district court for an injunction against any strike during the pendency of the appeal. The same day, June 22, 1961, after hearing argument, the court entered a decree enjoining the strike until such time as the Elgin, Joliet and

Eastern Railway Company's appeal was decided by the court of appeals (App. 469-70).

The district court based its decree of June 22, 1961, on the following findings (Fdgs. 2-5; App. 467-68):

> 2. Plaintiff's system serves and circumscribes the vast industrial concentration of metropolitan Chicago, Illinois. It is an integral part of the nationwide railway systems of the United States and connects and interchanges freight with thirty-three common carriers by rail which enter the City of Chicago. It provides terminal and switching facilities for more than 600 industries and renders railroad service to thousands of shippers annually. It carries large quantities of United States national defense supplies and equipment, and other freight needed for the maintenance of the health, comfort and welfare of the public.
>
> 3. If defendants were to strike during the pendency of plaintiff's appeal, such action would be seriously disruptive, in that the public is not prepared for such action and the industries served by plaintiff could not protect themselves from interference with services rendered to them.
>
> 4. The Court has inquired into and considered the equities of the parties herein and has further considered the equities of the general public as they would be affected by this matter. The Court has balanced the equities and found the equities of the general public greater than those of the defendants herein.
>
> 5. The Court finds that its judgment and decree heretofore entered herein on the issues in dispute include matters of first impression in the United States Courts and no settled rules of law have heretofore been laid down concerning those issues.

It also made the following conclusions of Law (Con. 1-2, App. 468):

> 1. The jurisdiction of this Court to grant an injunction during the pendency of this appeal exists under the provisions of Rule 62(c) of the Federal

Rules of Civil Procedure and the Judicial Code and the inherent powers of the Court.

2. The jurisdiction of this Court in granting an injunction during the pendency of this appeal under the provisions of Rule 62(c) is not limited by the provisions of the Norris-LaGuardia Act (29 U. S. C. Section 101 *et seq.*).

Thereafter all three brotherhoods perfected appeals to the court of appeals from the June 22, 1961, injunction pending appeal. The appeals of the brotherhoods and this appeal of Elgin, Joliet and Eastern Railway Company were heard by the court of appeals on the same day, but the brotherhoods urged that their appeals from the June 22, 1961, order be decided prior to the Railway's appeal from the June 21, 1961, decree. The court of appeals so acted, rendering two separate judgments and opinions. On May 3, 1962, it rendered judgment on the brotherhood's appeal from the June 22, 1961, decree, reversing the district court. It is this judgment which is the subject of this Petition for Writ of Certiorari. On the following day, May 4, 1962, the court of appeals rendered judgment on the Railway's appeal from the June 21, 1961, decree, affirming the district court. This judgment is the subject of a separate Petition for Writ of Certiorari, filed by the Railway contemporaneously with the filing of this Petition.

REASONS FOR GRANTING THE WRIT.

1. The court of appeals has decided an important issue of jurisdiction for the federal courts which has not been, but should be, settled by this Court—an issue involving the interrelationship of the Norris-LaGuardia Act with the judicial power vesting in the district courts by virtue of Article III of the Constitution, the All-Writs section of the Judicial Code and the congressional creation of district courts to exercise the judicial power of the United States.

2. The decision of the court of appeals is in conflict

with the decisions of every other court of appeals and district court which has dealt with the question.

3. The decision of the court of appeals is inconsistent with the same court's disposition of the identical question in 1958, in *Chicago & North Western Ry. Co.* v. *Order of Railroad Telegraphers*, 36 CCH Labor Cases, ¶ 65,283 (7th Cir. 1959).

4. The decision of the court of appeals in relying upon *Brotherhood of Railroad Trainmen* v. *Central of Georgia Ry. Co.*, 229 F. 2d 901 (5th Cir. 1956), *dismissed as moot*, 352 U. S. 995, which was overruled by this Court's decision in *Chicago River and Indiana R. Co.* v. *Brotherhood of Railroad Trainmen*, 353 U. S. 30 (1957), is in conflict with the principle laid down by this Court in the *Chicago River* case.

5. The decision of the court of appeals is wrong and will be productive of extraordinary disorder in the effective discharge by the lower federal courts of their responsibilities, and final resolution by this Court of the question presented is vital to the administration by the lower federal courts of Railway Labor Act and other injunction cases.

6. In denying the trial court power to preserve the existence of the pending controversy in order to permit appellate review, the decision of the court of appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

7. The question presented is of first magnitude for the railway and airline industries of the United States, railway and airline labor organizations, the public and, most important, the federal judiciary.

8. The question presented squarely poses an issue which this Court expressly found inadvisable to answer under the circumstances in *Order of Railroad Telegraphers* v. *Chicago & North Western Ry. Co.*, 362 U. S. 330, 342 (1960).

ARGUMENT.

A. This case squarely presents to this Court for the first time a question which it found inadvisable to answer in *Order of Railroad Telegraphers* v. *Chicago & North Western Ry. Co.*, 362 U. S. 330, 342 (1960):

> There are other subsidiary questions raised with reference to . . . an injunction pending appeal under Rule 62(c) of the Federal Rules of Civil Procedure. But since we have determined the main controversy between the parties, we think it inadvisable to decide either of these questions now. We intimate no opinion concerning either at this time.

We submit that this problem is of first magnitude for the railway and airline industries of the United States, railway and airline labor organizations, the public and, most importantly, the federal judiciary. It concerns a highly significant question of federal jurisdiction and statutory interpretation, the final resolution of which by this Court is vital to the administration by the lower federal courts of Railway Labor Act and other injunction cases.

The decision of the court of appeals, the first decision in the United States finding a district court impotent to grant an injunction pending appeal, carries with it enormously far-reaching implications. Our discussion will treat with but two main consequences: First, the decision, in direct conflict with decisions of this Court, has established a serious and unwarranted encroachment on the traditional exercise of federal judicial power. Second, the decision will be productive of extraordinary disorder in the discharge by the inferior federal courts of their responsibilities.

Prior to the decision in the case at bar the power of the

federal courts to preserve the *status quo* pending appeal was uniformly recognized by the courts. And prior to the *North Western* case, *supra*, there was no reported decision, either before or after the enactment of the Norris-LaGuardia Act (29 U. S. C. § 101-15), in which this power was effectively questioned. In that case the court of appeals denied a motion to dismiss the district court's injunction pending appeal, thereby refusing to adopt the position which it has now taken. *Chicago & North Western Ry. Co. v. Order of Railroad Telegraphers*, 36 CCH Labor Cases, ¶ 65,283 (7th Cir. 1959). This Court expressly found it inadvisable to rule upon the question under the circumstances. *Order of Railroad Telegraphers v. Chicago & North Western Ry. Co.*, 362 U. S. 330, 342 (1960).

In the instant case the court of appeals decision conflicts directly with an unbroken line of precedents which has established and defined jurisdictional power to grant stay orders pending appeal. In reaching its decision the court of appeals has completely ignored an essential source of federal judicial power, the All-Writs provision of the Judicial Code (28 U. S. C. § 1651), and has misinterpreted the fundamental relationship between it and the Federal Rules of Civil Procedure. Moreover, it also has failed to differentiate among the several types of equitable remedies which can be provided by a federal court. This failure has produced a sweeping and erroneous curtailment of judicial power by extending the Norris-LaGuardia Act far beyond its express terms and intent without regard to the teachings of legislative history. We submit that these several departures from established federal law, when taken with the erroneous interpretation of the Norris-LaGuardia Act, call for the granting of a writ of certiorari.

B. The primary issue—whether, subsequent to its finding of no jurisdiction to issue a permanent injunction, a federal court is ousted by the Norris-LaGuardia Act of

jurisdiction to issue a stay pending appeal—must be approached in the light of the sources of judicial power and the background and purposes of the Norris-LaGuardia Act.

As courts established by Congress pursuant to Article III of the Constitution of the United States, the district courts are invested with the full judicial power of the United States which has been conferred upon them by Congressional Act. Article III, Section 1; *Cary* v. *Curtis*, 3 How. 236, 245 (1845); *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 328-333 (1816). At the first session of Congress in 1789, the session at which Congress created the district courts and thereby first exercised its authority to create inferior courts, Congress also enacted, as part of the Judiciary Act, the sweeping All-Writs section which survives today. 1 Stat. 73; 28 U. S. C. § 1651. The All-Writs section in applicable part provides as follows:

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

That this section codifies the inherent judicial power to grant a stay pending appeal was reaffirmed in modern times in *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission*, 316 U. S. 4 (1942). This Court there held that the court of appeals had power wholly apart from the Federal Communications Act to enter a stay preserving the *status quo* pending appeal from an order of the Federal Communications Commission. The FCC contended that the court was without power to grant a stay pending appeal, because the Communications Act granted no such power. Mr. Justice Frankfurter, in rejecting this argument, stated at pp. 9-10 as follows:

> No court can make time stand still. The circumstances surrounding a controversy may change irrevocably during the pendency of an appeal, despite

> anything a court can do. But within these limits it is reasonable that an appellate court should be able to prevent irreparable injury to the parties or to the public resulting from the premature enforcement of a determination which may later be found to have been wrong. It has always been held, therefore, that as part of its traditional equipment for the administration of justice,[4] a federal court can stay the enforcement of a judgment pending the outcome of an appeal. *In re Claasen*, 140 U. S. 200; *In re McKenzie*, 180 U.S. 536.

As authority for this power the Court cited in Footnote 4, 316 U. S. at 10, to the All-Writs Section as follows:

> [4]Section 262 of the Judicial Code, 28 U. S. C. § 377, empowers the federal courts "to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law." This provision appeared in the very first Judiciary Act, 1 Stat. 73, 81-82. Compare District of Columbia Code (1940 ed.) Title 11-208, authorizing the Court of Appeals for the District of Columbia "to issue all necessary and proper remedial prerogative writs in aid of its appellate jurisdiction." 31 Stat. 1189, 1227.

The earlier decisions by this Court on this point emphasize the inherent power of the courts. For example, in *Hovey* v. *McDonald*, 109 U. S. 150 (1883), an assignee in bankruptcy filed a bill in the Supreme Court of the District of Columbia to restrain collection by the debtor of $200,000. A restraining order and subsequently a preliminary injunction were granted according to the prayer for relief. Thereafter, this and another injunction order were vacated. The question then arose as to whether an appeal automatically operated as a supersedeas.

This Court stated that the decree was not affected by the appeal, although it was well within the power of the court to have entered an injunction during the pendency

of the appeal. 109 U. S. at 161-62. Recognizing that the court had the inherent power to preserve the *status quo*, this Court stated at page 161 that:

> This power undoubtedly exists, and should always be exercised when any irremediable injury may result from the effect of the decree as rendered . . . .

The Court then discussed Equity Rule 93, which was adopted in 1878 and which was an antecedent of Equity Rule 74 (226 U. S. 670-71), the immediate predecessor of Rule 62(c) of the Federal Rules of Civil Procedure. Rule 93 stated that

> When an appeal from a final decree, in an equity suit, granting or dissolving an injunction, is allowed by a justice or judge who took part in the decision of the cause, he may, in his discretion . . . make an order suspending or modifying the injunction during the pendency of the appeal . . . .

The *Hovey* Court viewed this power as inherent federal power and stated that Equity Rule 93 was adopted "In recognition of the power, ..." 109 U. S. at 161.[2]

Accordingly, it seems clear that the Equity Rule did not *itself* grant the power to issue an injunction pending appeal since such power already existed all along. This view of the relationship between the rules and the judicial power itself has prevailed until the Court of Appeals decided the case at bar.

Federal Rule 82 states the underlying fact that the Federal Rules neither confer nor extend the jurisdiction of the United States district courts. The underlying sources

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2. Other early cases bear out the exercise of this power under various circumstances. *Beaumont, S. L. & W. Ry. v. United States*, 282 U. S. 74, 91-92 (1930); *Virginian Ry. v. United States*, 272 U. S. 658, 669 (1926); *Cumberland Tel. Co. v. Louisiana Pub. Serv. Comm'n*, 260 U. S. 212, 219 (1922); *Magnum Import Co. v. Coty*, 262 U. S. 159, 162-63 (1923); *In re McKenzie*, 180 U. S. 536, 550-51 (1901) and *In re Claasen*, 140 U. S. 200, 207-08 (1891).

of judicial power are found not in the Rules, but elsewhere. For example, this relationship was recognized by this Court recently in connection with Federal Rule 41(b). In *Link* v. *Wabash R. Co.*, 30 U. S. Law Week 4534 (United States Supreme Court, June 25, 1962), this Court characterized the authority of a Court to dismiss *sua sponte* for lack of prosecution as "inherent" and of "ancient origin", and stated that this power was "expressly recognized" in Rule 41(b). 30 U. S. Law Week at 4535. In addition, as Professor Moore points out, "Rule 62(c) is merely expressive of a power *inherent in the court* to preserve the status quo where, in its sound discretion, the court deems the circumstances so justify." *Moore's Federal Practice*, ¶ 62.05. (Emphasis added.) However, the court of appeals in its opinion ignored this inherent power and the All Writs section completely, never even mentioned them, and stated that Rules 65(e) and 82 "must be considered as qualifying the *authority granted* in Rule 62(c), F. R. C. P." (Appendix A, *infra*, p. A-4; emphasis added.) It is precisely this basic misconception, we submit, which led the court of appeals to and permeated its erroneous decision. That court never looked beyond the Federal Rules of Civil Procedure for the district court's power, a power which for many years has existed wholly independent of the Rules.

Since, as our discussion will demonstrate, the Norris-LaGuardia Act does not apply to injunctions pending appeal, the error of the court of appeals in restricting its attention to the Federal Rules of Civil Procedure would not necessarily have foreclosed a correct decision on the merits of the appeal. However, the error became crucial and determinative when the court of appeals held that the Norris-LaGuardia Act *did* apply to injunctions pending appeal and then went on to balance that Act with the Federal Rules, themselves not a source of power, instead of accommodating the Norris-LaGuardia Act, withholding jurisdic-

tion, to the All-Writs section and the inherent judicial power, granting jurisdiction. See *Chicago River & Indiana R. Co. v. Brotherhood of Railroad Trainmen*, 353 U. S. 30 (1957). Only a view of stunted judicial power could flow from this latter choice; a view which the court of appeals chose to adopt.

We assert that the court of appeals erroneously interpreted the Norris-LaGuardia Act, and we submit that this interpretation should not be allowed to stand. The court's holding overruled *sub silentio* a long line of lower federal court labor injunction cases decided since the enactment of the Act.[3] In these cases injunctions pending appeal were uniformly granted even though the Norris-LaGuardia Act had been held or had arguably applied to oust jurisdiction in the main case. The approach of these courts in this situation is wholly consistent with a proper analysis of the statute.

The court of appeals, in one sentence barren of authority, held that an injunction pending appeal was a "temporary injunction" within the meaning of the Norris-LaGuardia Act. There is no authority whatever for the court's proposition that:

> the injunction here in question is limited by its terms to the time required for a decision by this Court and it is, in fact, a temporary injunction. Appendix A, *infra*, p. A-2.

This unprecedented mingling of different equitable reme-

3. *Chicago River & Indiana R. Co. v. Brotherhood of Railroad Trainmen*, 229 F. 2d 926 (7th Cir. 1956), aff'd 353 U. S. 30 (1957); *Norfolk & Portsmouth Belt Line R. Co. v. Brotherhood of Railroad Trainmen*, 248 F. 2d 34 (4th Cir. 1957), cert. den. 355 U. S. 914 (1958); *Int'l Ladies' Garment Workers' Union v. Donnelly Garment Co.*, 147 F. 2d 246 (8th Cir. 1945), cert. den. 325 U. S. 852 (1945); *Chicago & North Western Ry. Co. v. Order of Railroad Telegraphers*, 36 CCH Labor Cases, ¶ 65,103 (N. D. Ill. 1958), motion to dismiss Federal Rule 62(c) injunction denied, 36 CCH Labor Cases, ¶ 65,283 (7th Cir. 1959).

dies does violence to the plain meaning of the Act. It is clear that the statutory term "temporary injunction" is a term of art, inserted as a label for a specific type of injunction the issuance of which by the courts was, prior to the enactment of the statute in 1932, subject to considerable abuse.

The Norris-LaGuardia Act withdrew jurisdiction from the courts of the United States to issue any "restraining order or temporary or permanent injunction" under certain circumstances. This term appears in Sections 1, 4, 5, 7 and 9. 29 U. S. C. § 101-15. There is no mention anywhere in the statute of "injunction pending appeal" or any other similar term. In the context of the history of judicial abuses which led to the enactment of this statute it is clear that the three enumerated types of equitable relief did not purport to include the injunction pending appeal or the *status quo* injunction.

The "temporary injunction" (apparently identical to the "preliminary injunction" of Rule 65 of the Federal Rules of Civil Procedure) was and is a provisional remedy granted by the trial court *prior to* a full hearing on the merits for a permanent injunction.[4] The reason it was excluded by the Act from the arsenal of traditional equitable remedies was the widespread practice in failure of evidentiary safeguards.

During the activity leading up to the enactment of the statute in 1932 Frankfurter and Greene published an exhaustive study of the federal cases involving injunctions in labor disputes. The study analyzed the types of injunctive relief and categorized them into temporary restraining orders, preliminary injunctions and permanent injunctions.

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4. The relief granted in these circumstances by the federal courts in the cases cited in footnote 3 at p. 13, *supra*, was called at various times a stay pending appeal, an injunction pending appeal, a *status quo* injunction and a continuance of the *status quo*.

Frankfurter and Greene, *The Labor Injunction*, 325-26 (1930). These types of relief were geared to the business of the trial court and had definite and fixed characteristics. The preliminary or temporary injunction, issued prior to a full hearing on the merits before the trial court, was frequently granted on untrustworthy affidavits and had a devastating effect on labor. Frankfurter and Greene discussed the "treachery of affidavits" and their inaccuracy and doubtful evidentiary value. *Id.* at 77.

They also state that, of eighty-eight temporary injunctions reported in the Federal Reporter, sixty-eight never were appealed from, and fifty-six, whether appealed or not, never went to final hearing on the merits. In New York of thirty-five temporary injunctions issued between 1923 and 1927 in no instance was there any further litigation. After analyzing possible reasons for this, Frankfurter and Greene conclude that it is "undeniably the fact" that the preliminary injunction in the main terminates the controversy. "The tentative truth rests in making ultimate truth irrelevant." *Id.* at 80.

Moreover, legislative history supports the view, as does *expressio unius est exclusio alterius*, that Congress intended to exclude from the prohibitions of Norris-LaGuardia all but those injunctions mentioned. The Senate Committee Report (S. Rep. 163, 72d Cong. 1st. Sess. 25 (1932), for example, stated as follows:

> The proposed bill is designed primarily as a practical means of remedying existing evils, and limitations are imposed upon the courts *in that class of cases* wherein these evils have grown up and become intolerable. (Emphasis added.)

The injunction pending appeal was not such an evil. Indeed, no mention of the injunction pending appeal has been found in Congressional debates or in reported court decisions preceding enactment of the Norris-LaGuardia

Act. The injunction pending appeal, issued or not in the discretion of the trial court after the entire hearing on the merits, carries with it none of the potential abuses sought to be proscribed. Safeguards such as testimony in open court, cross-examination and verified pleadings required by Section 7 to be present prior to issuance of a temporary injunction, have undoubtedly been met by the time the court is asked to maintain the *status quo* pending appeal.

We also submit that any doubts should be resolved in favor of an accommodation of the Norris-LaGuardia Act to the All-Writs section and the inherent power of the court. *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R. Co.*, 353 U. S. 30 (1957); Note, *Accommodation of the Norris-LaGuardia Act to Other Federal Statutes*, 72 Harv. L. Rev. 354 (1958). It is well settled that the Act cannot always be given literal application, although the court of appeals has so applied it. The principle of accommodation of the Norris-LaGuardia Act, espoused by this Court in the *Chicago River* case, has permitted injunctive relief in many cases where a literal reading of the Act would require the court to conclude that it had no jurisdiction. For example, there is no longer any question that a court may enjoin violations of the Railway Labor Act irrespective of the Norris-LaGuardia Act provisions.

In the *Chicago River* case this Court held that the anti-injunction policy of the Norris-LaGuardia Act was superseded by Railway Labor Act policy to protect the jurisdiction of the National Railroad Adjustment Board. Thus, Board jurisdiction is protected by the issuance of injunctive relief. In this way the Board may deliberate and decide a controversy without coercion or pressure brought against

it or any of the parties by a work stoppage and its resultant economic chaos.

Nevertheless, the court of appeals has now held, despite settled law empowering a court to protect by injunction the jurisdiction of federal statutory agencies irrespective of Norris-LaGuardia, that an injunction may not issue to protect the jurisdiction of the federal courts in which is vested the judicial power of the United States. Are the courts entitled to less deference in these matters?

Furthermore, the opinion of the court of appeals has also disregarded the extremely important case of *United States v. United Mine Workers of America*, 330 U. S. 258 (1947). Although the case did not involve an injunction pending appeal, it recognized the principle of protective jurisdiction where Norris-LaGuardia was urged as overriding the court's power to preserve a controversy for decision. The Court stated:

> . . . [T]he power of the District Court to grant the ancillary relief depended in great part upon the resolution of this jurisdictional question [applicability of Norris-LaGuardia]. In these circumstances, the District Court unquestionably had the power to issue a restraining order for the purpose of preserving existing conditions pending a decision upon its own jurisdiction. 330 U. S. at 290.

C. That portion of the court of appeals decision which relies on *Brotherhood of Railroad Trainmen* v. *Central of Georgia Ry. Co.*, 229 F. 2d 901 (5th Cir. 1956), is in direct conflict with the decision of this Court in *Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana R. Co.*, 353 U. S. 30 (1957).

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5. The principle of *Chicago River* is especially applicable here because the termination of a controversy before the Adjustment Board is closely analogous to the termination of a court controversy in a reviewing court. There is, therefore, no problem in the instant case of not having a procedure for the type of final decision which exists before the Board. 353 U. S. at 42, n. 24.

Central of Georgia was decided February 16, 1956, four days after the decision on February 6, 1956, by the Court of Appeals for the Seventh Circuit of *Chicago River & Indiana R. Co.* v. *Brotherhood of Railroad Trainmen*, 229 F. 2d 926 (7th Cir. 1956). The Fifth Circuit held, as the Court of Appeals for the Seventh Circuit states:

> . . . [T]he Norris-LaGuardia Act deprived the District Court of jurisdiction to enjoin a strike . . . to preserve the *status quo* of the controversy before the Railroad Adjustment Board pending a decision by that Board. (App. A-6.)

The Seventh Circuit, on the other hand, held that the Norris-LaGuardia Act does *not* oust court jurisdiction to preserve the *status quo*.

Certiorari in both cases was then applied for and, because of the conflict between the circuits, granted. *Brotherhood of Railroad Trainmen* v. *Central of Georgia Ry. Co.*, 352 U. S. 865; *Chicago River & Indiana R. Co.* v. *Brotherhood of Railroad Trainmen*, 352 U. S. 865. Subsequently, however, the *Central of Georgia* writ was dismissed for mootness. 352 U. S. 995.

Thereafter, this Court went on to decide the Seventh Circuit case, which it affirmed. *Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana R. Co.*, 353 U. S. 30 (1957).[6] This Court held that the anti-injunction policy of the Norris-LaGuardia Act should accommodate the Railway Labor Act policy to protect the jurisdiction of the National Railroad Adjustment Board. Accordingly, an injunction was upheld. Thus, the court of appeals decision

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6. "In addition to the importance of the question, there was a conflict in the decisions of the Courts of Appeals. *Brotherhood of Railroad Trainmen* v. *Central of Georgia Ry. Co.*, 229 F. 2d 901, decided by the Fifth Circuit, came to a conclusion contrary to that of the Seventh Circuit in this case. Certiorari had been granted in both cases, 352 U. S. 865, but we dismissed the writ in the *Central of Georgia* controversy upon a suggestion of [illegible]otness." 353 U. S. at 33, n. 3.

in the case at bar, is in large part, in direct conflict with a case decided by this Court.

D. In terms of financial injury alone, this precedent will undoubtedly cause incalculable future loss to both litigants and the public. The inability of the District Court to act in meritorious cases has the plain effect of substituting economic conflict for judicial review. A decision on the merits against a plaintiff-carrier in a Railway Labor Act injunction case will immediately free the defendant-labor organization to strike to achieve its demands. A complete cessation of rail service to the public would then ensue. Thus, extreme public and private injury are invited, a consequence which is wholly alien to the judicial system of the United States and which exists in no other area of litigation between private parties. The decision also establishes that a losing plaintiff-carrier in a Railway Labor Act injunction case has no effective right to judicial review. Circuit Judge Knoch, concurring, wrote:

> In other cases, almost invariably, when an appeal is taken, methods are available to maintain the status quo until the issues are resolved with ample provisions to protect all parties. There is, seemingly, inherent unfairness in a situation of this type where a reversal on appeal would represent an empty victory for the appellant. Appendix A, *infra* p. A-7.

Such deprivation of judicial review is in itself such a drastic departure from the basic constitutional and statutory rights which the legal system has established as to merit review by this Court.

E. The effect of the Court of Appeals' decision is, in most instances, to make the trial court the court of last resort. Irrespective of its desire for appellate guidance, and of the need for such guidance in the uniform administration of the National Railway Labor Act, the trial court may not preserve jurisdiction beyond the moment of its

decision. In cases similar to the case at bar which poses novel and difficult questions of law, especially questions of first impression, the burden on the trial court is intolerable.[7]

The instant case presents an excellent illustration. One of the most important reasons why the district court granted the stay pending appeal was its substantial doubt of the correctness of its decision. At the hearing on petitioner's motion for an injunction pending appeal, the court reasoned as follows:

> I have been doing a lot of research since yesterday on this matter, gentlemen. Yesterday when I decided this case—and I believe I decided it correctly, and while I believe I decided it correctly of course there are two steps above me—I don't know what ultimately will come in this matter. My judgment is that my decision is correct and it will stand up. But who am I to say that it will?
>
> I do believe this is a case of first impression. If I were founding this case upon well documented cases, cases almost on all fours, I would say that no injunction should be granted. (App. 266.)

And the following colloquy took place between counsel and the court:

> Mr. Naughton: . . . You are supposed to look at this case and decide whether you think there is any chance that you are incorrect. I look at this case and I

7. ". . . it must appear . . . that the district court entertains a serious doubt as to the correctness of its own decision . . . ." Mr. Justice Brandeis in *Virginian Ry. Co.* v. *United States*, 272 U. S. 658, 673 (1926). ". . . The court found that novel and important questions concerning which there was serious doubt were presented by the assignment of errors . . . . Undoubtedly the court had authority in its discretion, upon entry of the decree dismissing the bill, to stay the enforcement . . . pending appeal . . . . We think it clear that the court did not abuse its discretion in granting the stay." *Beaumont, S. L. & W. Ry. Co.* v. *United States*, 282 U. S. 74, 91-92 (1930). Compare also the court of appeals description of the question in the instant case as "perplexing."

find no chance whatsoever that your ruling is incorrect.

The Court: I am looking at it from that standpoint. I agree with your last statement, as far as I am concerned, but as the distinguished late Oliver Wendell Holmes said when he was 90 years old, and speaking about his experience in the Civil War, he said, "About 70 years ago I learned I was not God", and that is the reason for his approach in these problems, always considering that he might be wrong and that the administrative bodies or somebody else might be right. So I try to approach these things from the standpoint that I might be wrong, since the Supreme Court has said I was wrong in so many instances. (App. 262-63.)

CONCLUSION.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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July , 1962.

APPENDIX A.

In the United States Court of Appeals

For the Seventh Circuit.

September Term 1961—April Session 1962

Nos. 13445 and 13447

Elgin, Joliet & Eastern Railway Company,
Plaintiff-Appellee,
v.
Brotherhood of Railroad Trainmen, et al.,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

May 3, 1962

Before Duffy, Knoch and Kiley, *Circuit Judges.*

Duffy, *Circuit Judge.* This is a companion case to No. 13444 wherein Elgin, Joliet & Eastern Railway Company is the plaintiff-appellant and the three brotherhoods, Brotherhood of Railroad Trainmen (BRT), Brotherhood of Locomotive Firemen and Enginemen (BLFE) and Order of Railway Conductors and Brakemen (ORCB), are the defendants-appellees. That action was brought to restrain a strike scheduled to commence on May 20, 1961. A temporary restraining order was entered on May 19, 1961, and was continued in effect by agreement of the parties, pending final action by the District Court after a hearing on the merits. Such a hearing was held. There-

after, the District Court vacated and dissolved the temporary restraining order, denied plaintiff's application for a permanent injunction, and dismissed the suit.

Plaintiff Railway Company promptly filed a notice of appeal. On June 22, 1961, on motion of the plaintiff, the District Court entered an order enjoining defendants from striking pending plaintiff's appeal. The Court found "the equities of the general public greater than those of the defendants" and that the issues include matters of first impression on which no settled rules have been laid down. The brotherhoods appealed from the order granting the injunction pending plaintiff's appeal.

Although the instant appeals and the appeal in No. 13444 were argued before us on the same date, the brotherhoods urge that the opinion in this case be handed down first, pointing out that if we first decide the issues in No. 13444, the important issue which they raise in the instant appeals would be moot.

Section 10 of the Norris-LaGuardia Act (29 U.S.C. Sec. 110) requires that all appeals from the issuance of a temporary injunction in a labor dispute be given precedence over all other appeals except older matters of the same character.

This case involves and grows out of a labor dispute. The parties are an employer and its employees. The injunction here in question is limited by its terms to the time required for a decision by this Court and it is, in fact, a temporary injunction. The Norris-LaGuardia Act applies to "any" temporary injuction in a labor dispute. We think the brotherhoods are entitled to have the decision in the instant appeals handed down prior to our decision in No. 13444.

The question presented by these appeals is, indeed, perplexing. No case has been cited to us, and we know

of none, which has specifically ruled on the issue here presented. The precise question was raised in this Court in *Chicago & North Western Railway Co.* v. *Order of Railroad Telegraphers, et al.*, 7 Cir., 264 F. 2d 254. However, in that case we held a permanent injunction should have been granted, and we did not decide the point here at issue.

Upon appeal of the *Telegraphers'* case, the Supreme Court stated, 352 U. S. 330, 342: "There are other subsidiary questions raised with reference to the validity of . . . an injunction pending appeal under Rule 62(c) of the Federal Rules of Civil Procedure. But since we have determined the main controversy between the parties, we think it inadvisable to decide either of these questions now. We intimate no opinion concerning either at this time."

Section 4 of the Norris-LaGuardia Act (29 U. S. C. Sec. 104) provides, in part: "No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons . . . from . . . (a) Ceasing or refusing to perform any work or to remain in any relation of employment;" and "(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified."

This language of Section 4 seems clear and unambiguous. However, Rule 62(c), F.R.C.P., which has the effect of a statute (*Winsor* v. *Daumit*, 7 Cir., 179 F. 2d 475, 477), provides in part: "(c) Injunction Pending Appeal. When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its decretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal

upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party."

Consideration must also be given to the effect, if any, of Rule 65(e) and Rule 82, F.R.C.P. Rule 65 is entitled "Injunctions" and provides, in part: "(e) Employer and Employee; . . . These rules do not modify any statute of the United States relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee; . . ."

Rule 82 provides: "Jurisdiction and Venue Unaffected. These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein."

The various rules are entitled to equal respect. If possible, they should be given an interpretation which makes them consistent with each other. In our view, Rules 65(e) and 82, F.R.C.P. must be considered as qualifying the authority granted in Rule 62(c), F.R.C.P.

A recent case with somewhat similar facts is *Chicago, Rock Island & Pacific Railroad Co., et al.* v. *Switchmen's Union of North America, et al.*, 2 Cir., 292 F. 2d 61. The Railroad sued to enjoin a strike involving a major dispute over wages. The carrier pointed out the Switchmen's constitution provided for arbitration and contended the calling of the strike violated the Railway Labor Act and thus the union did not act in good faith. A temporary injunction was issued on the ground the union had not engaged in good faith efforts to reach a final agreement. The union appealed on the ground the Norris-LaGuardia Act withdraws jurisdiction from the district court to enjoin the strike. The carrier contended the temporary injunction should stand in the absence of a showing that it was clearly erroneous.

The Court of Appeals held that Section 4 of the Norris-

LaGuardia Act withdrew jurisdiction to enjoin the strike. The Court said, 292 F. 2d 61, 71:

> "Beyond this, whatever the general rule as to the scope of review of temporary injunctions may be, no such principle as plaintiffs advocate can be applicable to a claim that such an injunction transgresses the COMMAND of § 4 of the Norris-LaGuardia Act. That section uses the most emphatic words possible—'No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction' against a peaceful strike. To overcome that bar plaintiffs had the burden of showing as a matter of law, that the broad command of § 4 is subject to an exception when a union has violated its duties under the Railway Labor Act and, as a matter of fact, that the defendant here had done that. They were obliged to meet that burden, not simply to show they might be able to meet it; until they met it, the court was without power to issue an injunction whether temporary or permanent." (footnote omitted)

True, there is a distinction from the case at bar. The *Rock Island* case was an appeal from a temporary injunction pending a hearing on the merits, while the instant case is a temporary injunction pending an appeal. However, unless some distinction can be drawn between the impact of the Norris-La Guardia Act on an injunction issued *pendente lite* and a temporary injunction pending a hearing on appeal, the holding of the Second Circuit provides a guide for a decision on the issue before us.

Another case which might also be distinguished but, nevertheless, furnishes some guidance is *Brotherhood of Railroad Trainmen, Local Lodge No. 721, et al. v. Central of Georgia Railway Company*, 5 Cir., 229 F. 2d 901. There, the carrier sought injunctive relief. A temporary injunction was issued *pendente lite*, enjoining the union from endeavoring by self help (a strike) to effect a modifica-

tion of an award. The District Court held it was necessary to preserve the *status quo* pending a decision of the controversy before the Railroad Adjustment Board. The Court of Appeals reversed, holding the Norris-LaGuardia Act deprived the District Court of jurisdiction to enjoin a strike even if all that was sought was to preserve the *status quo* of the controversy before the Railroad Adjustment Board pending a decision by that Board.

In the case at bar, the issues were decided in favor of the unions. The Court held the carrier was not entitled to an injunction restraining the strike. However, by granting the injunction pending the appeal, the unions were restrained from carrying out the strike which they had called. The injunction was issued at the expense of the unions. In our view, the sweeping provisions of the Norris-LaGuardia Act deprived the District Court of jurisdiction to issue the temporary injunction pending the appeal.

The carrier suggests a labor dispute no longer exists. The unions do not have their pension plan and they were deprived of their right to strike. We hold the labor dispute does exist.

The temporary injunction issued pending appeal should not have been entered. The provision in the judgment restraining the brotherhoods from striking pending appeal should be stricken.

REVERSED.

Nos. 13445 and 13447

KNOCH, *Circuit Judge*. (Concurring) The Norris-LaGuardia Act as it now reads dictates the foregoing decision under the admitted facts of this particular case.

In other cases, almost invariably, when an appeal is taken, methods are available to maintain the status quo until the issues are resolved with ample provisions to protect all parties. There is, seemingly, inherent unfairness in a situation of this type where a reversal on appeal would represent an empty victory for the appellant.

However, this situation should not be remedied by judicial edict, but, rather by Congressional consideration.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

Thursday, May 3, 1962.

Before

Hon. F. Ryan Duffy, Circuit Judge.
Hon. Wm. G. Knoch, Circuit Judge.
Hon. Roger J. Kiley, Circuit Judge.

Elgin, Joliet & Eastern Railway Company, *Plaintiff-Appellee,* vs. Brotherhood of Railroad Trainmen et al., *Defendants-Appellants*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 13445-13447.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court entered therein on June 22, 1961, enjoining defendants from striking pending the disposition of these appeals, as in this cause appealed from be, and the same is hereby REVERSED, with costs, in accordance with the opinion of this Court filed this day.

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

No. 13444 September Term, 1961—April Session, 1962.

Elgin, Joliet & Eastern Railway Company,
Plaintiff-Appellant,
v.
Brotherhood of Railroad Trainmen, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

May 4, 1962.

Before DUFFY, KNOCH and KILEY, *Circuit Judges.*

DUFFY, *Circuit Judge.* This suit was brought against the Brotherhood of Railroad Trainmen (BRT), Brotherhood of Locomotive Firemen and Enginemen (BLFE) and Order of Railway Conductors and Brakemen (ORCB) to restrain a strike scheduled to commence at 6 a.m. on May 20, 1961. The District Court entered a temporary restraining order on May 19, 1961. This restraining order was continued in effect by agreement of the parties, pending final action by the District Court after a hearing on the merits.

On June 21, 1961, after the hearing on the merits, the District Court entered Findings of Fact and Conclusions of Law favorable to the defendants; the temporary restraining order was dissolved and the action was dismissed

at plaintiff's costs. Plaintiff forthwith filed a notice of appeal and moved for an injunction restraining defendants from striking pending said appeal. On June 22, 1961, the District Court granted plaintiff's motion for an injunction pending appeal stating that it did so pursuant to the provisions of Rule 62(c), F.R.C.P. "and the inherent powers of the Court." Defendant brotherhoods appealed from the order of June 22, 1961, granting the injunction pending appeal. These appeals have been designated in this Court as Nos. 13445 and 13447, and are being separately considered.

Plaintiff is a common carrier engaged in interstate commerce by railroad and is a "carrier" within the meaning of that term as defined in the Railway Labor Act. Plaintiff's railroad system connects and interchanges freight with thirty-three common carriers by rail which enter the city of Chicago. Its capital stock is owned by the United States Steel Corporation.

The defendant brotherhoods are labor organizations, national in scope, and are subject to the provisions of the Railway Labor Act. The BRT is exclusive bargaining representative for 1200 employees, the BLFE for 400 firemen and the ORCB for 55 road conductors.

The dispute between the parties concerns non-contributory pensions supplemental to Railroad Retirement Act benefits. A pension plan known as II-B had expired by its terms on October 31, 1959. This pension plan as well as a previous plan was included in collective bargaining agreements between plaintiff and each of the defendants, BRT, BLFE and ORCB, on behalf of the respective class or craft of plaintiff's employees represented by such labor organizations.

The brotherhood defendants sought pension benefits different from and in addition to those available under II-B.

On October 1, 1959, each brotherhood served notice on plaintiff pursuant to Section 6 of the Railway Labor Act. The notice was as follows:

> "Kindly consider this as a thirty (30) day notice under the provisions of Section 6 of the amended Railway Labor Act to extend the current Non-Contributory Pension Agreement [H-B] between the Elgin, Joliet and Eastern Railway Company and the [BRT, ORCB, and BLFE] effective November 1, 1957, until such date when the United States Steel Workers reach an agreement on a Non-Contributory Pension Plan, after which date, the above referred to Organization[s] shall have the option of substituting the new pension plan (being negotiated by the United States Steel Workers) in place of the pension plan now in effect covered by the aforementioned pension agreement; and or also have the option to renew, modify, or change the above referred to pension agreement as may be deemed advisable."

All three brotherhoods requested joint handling of their notices, and this procedure was followed between the plaintiff and the brotherhoods in the collective bargaining conferences which followed. Paul H. Verd, Vice President of plaintiff, was its principal negotiator. He offered to grant extensions of plan H-B for periods of three years, two years or one year, but refused to consider extensions for shorter periods as requested by the brotherhoods.

At the date of the service of the Section 6 notice, a strike was in progress called by employees of United States Steel. This strike was settled about January 1, 1960, and in the settlement it was agreed there would be changes in the non-contributory pension plan between United States Steel Corporation and its employees represented by United States Steel Workers. A copy of the new plan was not available to the brotherhoods representing plaintiff's employees for some months thereafter. This new plan was known as Plan H-CR and was not discussed by

Mr. Verd until the joint conference held on February 23, 1961.

During the collective bargaining conferences, the brotherhoods urged plaintiff to restore or increase benefits theretofore paid to retired employees of plaintiff. Mr. Verd was of the opinion that he was not required by the Railway Labor Act to bargain with employees of plaintiff concerning the pension plan sought by the brotherhoods. However, he did, in fact, bargain upon the plan.

Joint conferences with respect to the Section 6 notice were held on October 26 and 27, 1959, without an agreement being reached. Largely due to the steel strike, a third conference was not held until July 29, 1960. Again, no agreement was reached.

The brotherhoods then requested intervention of the National Mediation Board. On August 22, 1960, the Board advised plaintiff and the brotherhoods that it had taken jurisdiction. The first joint mediation session was held on November 30, 1960. No further meetings were held until February 23, 1961. The final joint mediation conference was held on February 27, 1961, but no agreement was reached.

On March 8, 1961, the National Mediation Board proffered arbitration. The plaintiff accepted, but on March 10, 1961, all of the brotherhoods jointly rejected arbitration.

By letters dated March 13 and March 16, 1961, mediation services were terminated by the Board. On April 14, 1961, plaintiff sent telegrams to officials of defendant brotherhoods requesting further conferences which were held on April 19, 21 and 24, 1961, without an agreement being reached.

On May 16, 1961, the Board, by telegram, advised all parties that defendants had authorized a strike to begin

May 20, 1961, at 6 a.m. and requested the brotherhoods to defer strike action. However, the brotherhoods refused to comply with this request. On May 18, 1961, at 10 p.m., the National Executive Officials of the three defendant brotherhoods posted a notice on plaintiff's property, giving authority for a strike effective Saturday, May 20, 1961, at 6 a.m.

Although plaintiff's brief lists twenty-eight separately stated "contested issues," we think the issues in this case may be considered under five subheads.

I

Plaintiff contends the strike scheduled for May 20, 1961, was illegal because the National Mediation Board had not completed its emergency mediation. Plaintiff argues the Mediation Board's request of May 16, 1961, for further meeting, started the running of a "reasonable time" during which the strike would be illegal. Plaintiff does not suggest what period of time would meet such a test. It does not contend that any second 30-day *status quo* period was involved. The District Court pointed out that the resumption of mediation was on the agreement that defendants did not waive their right to strike pursuant to notices already served. We hold this first contention of plaintiff must be overruled.

II

Plaintiff also contends that the demands of the defendant brotherhoods regarding pension agreements were not a subject of mandatory collective bargaining because not included within the phrase "rates of pay, rules, and working conditions" as those terms are used in Sections 2 First, 2 Seventh and 6 of the Railway Labor Act (45 U. S. C. 152, 156). As a corollary to this contention, plaintiff alleges

that the brotherhoods may not lawfully strike for increased non-contributory pensions for retired persons.

The Railway Labor Act does not specifically mention pension plans as a subject of mandatory collective bargaining. However, this Court, in *Inland Steel Co.* v. *NLRB*, 7 Cir., 170 F. 2d 247, construing similar language in the National Labor Relations Act, held that pension plans were properly the subject of mandatory collective bargaining. In spite of the difference in terminology between the National Labor Relations Act and the Railway Labor Act, we think the conclusion reached in the *Inland* case is applicable here. *McMullans, et al.* v. *Kansas, Oklahoma and Gulf Railway Co., Inc., et al.*, 10 Cir., 229 F. 2d 50, 54-55.

We do not reach the contention that the brotherhoods may not lawfully strike for increased non-contributory pensions for retired persons. The District Court in its Findings of Fact stated, ". . . Neither the Section 6 Notices served by the labor organizations nor the strike ballots taken by them referred to retired employees. Officers of the BRT, ORCB, and BLFE never at any time threatened to strike against the plaintiff on account of the position of such retired employees. . . ." In the absence of a showing that such Findings of Fact were clearly erroneous (Rule 52(a), F. R. C. P.), this Court is bound by them and the issue of the lawfulness of a strike to obtain increased pension benefits for retired employees is, in fact, a moot question.

III

Plaintiff further contends that the scheduled strike was illegal in that the brotherhoods failed to make every reasonable effort to settle all disputes and did not accept arbitration.

Arbitration under the Railway Labor Act is voluntary, not compulsory. Section 7 First of the Railway Labor Act

(45 U.S.C. 157) provides in part: "That the failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this chapter or otherwise."

While it is possible that a refusal to arbitrate might be a factor in determining whether every reasonable effort was made to settle all disputes, the refusal to arbitrate in and of itself does not constitute a failure to make every reasonable effort to settle all disputes. To hold that the failure to arbitrate, *per se*, is the failure to exert every reasonable effort to make agreements and settle all disputes, would make a nullity of Section 7.

Plaintiff relies on *Brotherhood of Railroad Train. en. Enterprise Lodge, No. 27, et al. v. Toledo, Peoria & Western Railroad*, 321 U.S. 50. The Supreme Court, in that case, held that Section 8 of the Norris-LaGuardia Act (29 U.S.C. 108) would bar a complainant from injunctive relief if he had not submitted the dispute to arbitration. The Court stated, at page 63:

> "Respondent's failure or refusal to arbitrate has not violated any obligation imposed upon it, whether by the Railway Labor Act or by the Norris-LaGuardia Act. No one has recourse against it by any legal means on account of this failure. Respondent is free to arbitrate or not, as it choses. But if it refuses, it loses the legal right to have an injunction issued by a federal court or, to put the matter more accurately, it fails to perfect the right to such relief. This is not compulsory arbitration. It is compulsory choice between the right to decline arbitration and the right to have the aid of equity in a federal court."

It must be conceded that the language used by the Court, " . . . and the right to have the aid of equity in a federal court" is very broad. However, construing it in context with the other language used in the paragraph

hereinbefore quoted, we hold Section 8 is not applicable to the brotherhoods in the case at bar. The brotherhoods were not seeking injunctive relief and failure to arbitrate did not violate the Railway Labor Act.

The application of Section 4 of the Norris-LaGuardia Act (29 U.S.C. 104) is not affected by the failure of the brotherhoods to arbitrate. Section 4 is applicable to the dispute under consideration and it operates so as to prevent the granting of injunctive relief to plaintiff.

We hold that plaintiff's argument that defendant brotherhoods failed to make every reasonable effort to settle the dispute, is without merit.

IV

Plaintiff argues that conduct which violates the provisions of the Railway Labor Act may be enjoined in spite of the Norris-LaGuardia Act. However, it is admitted by plaintiff that the disputed question is a "major dispute." The Supreme Court has held that Section 4 of the Norris-LaGuardia Act is applicable to "major disputes" within the meaning of the Railway Labor Act. *Order of Railroad Telegraphers, et al.* v. *Chicago & North Western Railway Co.*, 362 U.S. 330.

This question needs no further discussion here. Plaintiff's argument is based upon the proposition that the brotherhoods' conduct in this case violated the Railway Labor Act. We have held to the contrary. We hold the District Court was correct in holding that it was deprived of jurisdiction to issue an injunction by reason of the provisions of the Norris-LaGuardia Act.

V

Plaintiff urges error on the part of the trial court in awarding attorney's fees to the defendant brotherhoods. We find this contention to be without merit. Section 7 of the Norris-LaGuardia Act (29 U.S.C. 107) provides in part:

> "No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court."

There was no error in the awarding of attorney's fees to the defendant brotherhoods.

We have considered all of plaintiff's contentions and find them to be without merit.

The judgment of the District Court is

AFFIRMED.

UNITED STATES COURT OF APPEALS,

For The Seventh Circuit,

Chicago 10, Illinois.

Friday, May 4, 1962.

Before

Hon. F. Ryan Duffy, *Circuit Judge*.
Hon. Wm. G. Knoch, *Circuit Judge*.
Hon. Roger J. Kiley, *Circuit Judge*.

Elgin, Joliet and Eastern Railway Company *Plaintiff-Appellant,* *vs.* Brotherhood of Railroad Trainmen, et al., *Defendants-Appellees.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 13444

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court entered therein on June 21, 1961, in this cause appealed from be, and the same is hereby, affirmed with costs, in accordance with the opinion of this Court filed this day.

APPENDIX B

Section 1 of the Norris-LaGuardia or Anti-Injunction Act of 1932, 47 Stat. 70, 29 U.S.C., § 101, provides:

> That no court of the United States, as herein defined, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this Act; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this Act.

Section 4 of the Norris-LaGuardia or Anti-Injunction Act of 1932, 47 Stat. 70, 29 U.S.C., § 104, provides:

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:
>
> (a) Ceasing or refusing to perform any work or to remain in any relation of employment;
>
> (b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 3 of this Act;
>
> (c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;
>
> (d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 3 of this Act.

Section 5 of the Norris-LaGuardia or Anti-Injunction Act of 1932, 47 Stat. 71, 29 U.S.C., § 105, provides:

No court of the United States shall have jurisdiction to issue a restraining order or temporary or permanent injunction upon the ground that any of the persons participating or interested in a labor dispute constitute or are engaged in an unlawful combination or conspiracy because of the doing in concert of the acts enumerated in Section 4 of this Act.

Section 7 of the Norris-LaGuardia or Anti-Injunction Act of 1932, 47 Stat. 71, 29 U.S.C., § 107, provides:

No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as herein defined, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no

injunction or temporary restraining order shall be issued on account of any threat or unlawful act except-ing against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also to the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property: *Provided, however*, That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erro-

neous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.

The undertaking herein mentioned shall be understood to signify an agreement entered into by the complainant and the surety upon which a decree may be rendered in the same suit or proceeding against said complainant and surety, upon a hearing to assess damages of which hearing complainant and surety shall have reasonable notice, the said complainant and surety submitting themselves to the jurisdiction of the court for that purpose. Nothing in this section contained shall deprive any party having a claim or cause of action under or upon such undertaking from electing to pursue his ordinary remedy by suit at law or in equity.

Section 9 of the Norris-LaGuardia or Anti-Injunction Act of 1932, 47 Stat. 72, 29 U.S.C., § 72, provides:

No restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the court in the record of the case prior to the issuance of such restraining order or injunction; and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in said findings of fact made and filed by the court as provided herein.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 246

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY, A CORPORATION,

Petitioner,

vs.

BROTHERHOOD OF RAILROAD TRAINMEN, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No.

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY, A CORPORATION;

Petitioner,

vs.

BROTHERHOOD OF RAILROAD TRAINMEN, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Elgin, Joliet and Eastern Railway Company prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above entitled case on May 4, 1962.

OPINIONS BELOW.

The memorandum of the district court (App. 467-70) is reported at 196 F. Supp. 158, 166 (N. D. Ill. 1961). The opinions of the Court of Appeals are reported at 302 F. 2d 540, 545 (7 Cir. May 3 and 4, 1962) (See Appendix A, *infra*, pp. A-1—A-9, for the opinion of May 4, 1962, to which this Petition relates).

JURISDICTION.

The judgment of the court of appeals was entered May 4, 1962 (Appendix A, *infra*, p. A-10). Petition for rehearing was denied by the Court of Appeals on June 7, 1962. The jurisdiction of this court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Whether the distinctive Railway Labor Act phrase "rates of pay, rules, or working conditions" requires that the granting of non-contributory pensions shall be subject to the duty of mandatory collective bargaining and the right to strike?

2. Whether railroad brotherhoods lawfully may strike for increased non-contributory pensions for retired persons who are not employees and for whom the brotherhoods have no power to bargain under the Railway Labor Act?

3. Whether railroad brotherhoods may lawfully strike during the pendency of emergency mediation by the National Mediation Board pursuant to Section 5 First of the Railway Labor Act?

4. Whether, under Section 5 First of the Railway Labor Act, which provides for emergency mediation "at any time," the National Mediation Board has power, in a major dispute over changes in collective agreements, to invoke emergency mediation anew after termination of its normal mediatory functions under that section?

5. Whether, under Section 5 First of the Railway Labor Act, which authorizes and governs the mediatory functions of the National Mediation Board, the Board also derives power to conduct informal operations purporting not to have the statutory consequences of Section 5 First?

6. Whether, when the injunction bond is not conditioned

to provide for attorneys' fees, defendants in a labor injunction suit are entitled to recover attorneys' fees under the bond or Section 7 of the Norris-LaGuardia Act?

STATUTES INVOLVED.

Sections 1, 4, 5, 7, 9 and 13 of the Norris-LaGuardia or Anti Injunction Act of 1932, 47 Stat. 70, 29 U. S. C., §§ 101, 104, 105, 107, 109, 113 and Sections 1, Fifth, 2, 5 and 6 of the Railway Labor Act as amended, 44 Stat. 577, 48 Stat. 1185; 49 Stat. 1189; 54 Stat. 785, 62 Stat. 991, 63 Stat. 107, 45 U. S. C. §§ 151, 151a, 152, 155, 156, are set forth in Appendix B hereto, *infra*, pp. B-1–B-17, and relevant excerpts are quoted in the discussion, *infra*.

STATEMENT.

Elgin, Joliet and Eastern Railway Company filed a suit on May 19, 1961, in the district court seeking to enjoin the Brotherhood of Railroad Trainmen, Brotherhood of Locomotive Firemen and Enginemen and the Order of Railway Conductors and Brakemen (hereinafter "brotherhoods") from striking on the following day over certain collective bargaining demands. The district court entered a temporary restraining order on May 19, 1961. This order was continued in effect by agreement pending final action by the court after a hearing on the merits. Such a hearing was held, and thereafter, on June 21, 1961, the court denied petitioner's application for a permanent injunction and dismissed the complaint.

On June 22, 1961, petitioner filed its notice of appeal and on the same day the district court entered an order under Rule 62(c), enjoining the brotherhoods from striking during the pendency of that appeal (App. 469). The brotherhoods then appealed from the order granting the Rule 62(c) injunction (App. 472, 477).

The court of appeals handed down separate opinions, the first on May 3, 1962, reversed the order granting the injunction pending appeal, and the second on May 4, 1962, affirmed the order denying a permanent injunction. Two petitions for writ of certiorari have been filed by the petitioner. This petition seeks a review only of the order affirming the denial of the permanent injunction. Another petition filed contemporaneously with this petition seeks a review of the court of appeals reversal of the issuance of the injunction pending appeal.

REASONS FOR GRANTING THE WRIT.

1. The court of appeals has decided important questions of federal railway labor law which have not been, but should be, settled by this court.

A. The court of appeals' decision, for the first time in the railroad industry, extends to the subject of non-contributory pensions the duty of mandatory bargaining and the right to strike, thereby ignoring the history and custom of the industry, and the congressional choice of language which distinctively expresses the duty to bargain governing this unique industry.

B. The mandatory bargainability of pensions and similar fringe benefits is a matter of grave importance to the national economy and to the railroad and airline industries, employees, and labor organizations.

C. The question of the right to strike for retired persons—nonemployees who are not represented by the striking brotherhoods—is a novel matter of nation-wide importance under the federal labor laws.

D. The legal rights and duties governing the National

Mediation Board, railroads and railway labor organizations in emergency mediation under Section 5 First of the Railway Labor Act urgently require a uniform and clarifying interpretation to correct the uncertain, conflicting and confused state of the existing law.

2. The decision of the court of appeals fails to give proper effect to the decision of this court in *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330, 354, 389 (1935), which held that to place the burden of pensions for retired persons upon railroads was a taking of property without due process of law.

3. The decision of the court of appeals is in conflict with the decision of the court of appeals for the 8th Circuit in *International Ladies' Garment Workers' Union* v. *Donnelly Garment Co.*, 147 F. 2d 246 (8th Cir.), *cert. denied* 325 U. S. 852 (1945), in allowing the brotherhoods the recovery of attorneys' fees under Section 7 of the Norris-LaGuardia Act.

ARGUMENT.

I. BARGAINABILITY OF NON-CONTRIBUTORY PENSIONS.

1. The case at bar is the first to hold that non-contributory pensions, as demanded by the brotherhoods, are the subject of mandatory bargaining within the Railway Labor Act. Yet in but one sentence[1] the court of appeals repudiated both sixty years of railroad custom and the congressional effort, in the enactment of the Railway Labor Act, to establish a special statute for the unique problems of the railroad industry.

The court of appeals has ventured, in a single sentence, into an area which no other court ever reached—the mandatory bargainability of so-called fringe benefits under the Railway Labor Act. This area of federal law is an extremely important one of far-reaching economic and social consequences. It deserves a comprehensive treatment which will govern and enlighten the industry, and which will guide the courts when faced with such problems in the future.

2. The governing choice of language used by Congress in Sections 2 First, 2 Seventh and 6(a) of the Railway Labor Act specifies "*rates of pay, rules, or working conditions.*" 45 U. S. C. §§ 152, 156 (Emphasis added). In contrast, the National Labor Relations Act, § 8(d), refers to "wages, hours, and other terms and conditions of employment" and § 9(a) refers to "collective bargaining in respect to *rates of*

1. "In spite of the difference in terminology between the National Labor Relations Act and the Railway Labor Act, we think the conclusion reached in the *Inland* case is applicable here." (Appendix A, *infra*, p. A-6). The reference is to *Inland Steel Co. v. National Labor Relations Board*, 170 F. 2d 247 (7th Cir.), *cert. denied*, 336 U. S. 960 (1948).

pay, wages, hours of employment, or other conditions of employment." (29 U. S. C. §§ 158, 159.) (Emphasis added.)

Outside the railroad industry, under the National Labor Relations Act language, it seems settled that pensions are a lawful subject of mandatory collective bargaining. *Inland Steel Co.* v. *National Labor Relations Board*, 170 F. 2d 247 (7th Cir. 1948), *cert. denied* 336 U. S. 960 (1949). However, in the *Inland* decision the court distinguished the Railway Labor Act situation as being "quite different." (170 F. 2d 247, 254.)[2]

The difference between the Railway Labor Act "rates of pay, rules, and working conditions" and the National Labor Relations Act "wages, hours, and other terms and conditions of employment" is substantial, not purely formal. It reflects the sharply defined distinction between usage and custom in the railroad industry, on the one hand, and in the non-railroad industry, on the other. This distinction should be controlling in this case.

It is well established that industry practice is often determinative in deciding questions of bargainability. For example, a majority of this Court recently wrote that "the whole idea of what is bargainable has been greatly affected by the practices and customs of the railroads and their employees themselves." *Order of Railroad Teleg-*

2. "In this connection, we think it is pertinent to note that in the Railway Labor Act the bargaining language was quite different from that of the instant legislation. There, it read, 'rates of pay, rules, or working conditions.' Here, it reads, 'rates of pay, wages, hours of employment, or other conditions of employment.' A comparison of the language of the two Acts shows that Congress in the instant legislation must have intended a bargaining provision of broader scope than that contemplated in the Railway Labor Act. Certainly the term 'wages' was intended to include something more than 'rates of pay.' Otherwise, its use would have served no purpose. Congress in the instant legislation used the phrase, 'other conditions of employment,' instead of the phrase, 'working conditions,' which it had previously used in the Railway Act. We think it is obvious that the phrase which it later used is more inclusive than that which it had formerly used." 170 F. 2d 247, 254, 255.

raphers v. *Chicago & North Western R. ...* 362 U. S. 330 (1960). And the Court in *National Labor Relations Board* v. *American Nat'l Insurance Co.*, 343 U. S. 395 (1952), was strongly influenced by the fact that "bargaining for management functions clauses is common collective bargaining practice." 343 U. S. at 407. Similarly, in discussing the NLRB's position that irrespective of industry custom an employer must *agree* to freeze a work schedule standard, the Court declared (343 U. S. at 408):

> Bargaining for more flexible treatment of such matters would be denied employers even though the result may be contrary to common collective bargaining practice in the industry. The Board was not empowered so to disrupt collective bargaining practices. On the contrary, the term 'bargain collectively' as used in the Act 'has been considered to absorb and give statutory approval to the philosophy of bargaining as worked out in the labor movement in the United States.' *Telegraphers* v. *Railway Express Agency*, 321 U. S. 342, 346 (1944).

3. What, then, is the industry practice? The distinction could not be clearer. In the non-railroad industry, pension plans which are products of collective bargaining are common. U. S. Department of Labor Bulletin No. 1284, *Pension Plans Under Collective Bargaining* (1959.) (This recent study expressly excludes the Railway Labor Act industries, railroads and airlines.)

By contrast, however, the custom in the railroad industry is established that although supplementary pensions are common, they are *not* customarily subject to collective bargaining. In October, 1960, among the 27 Class I line haul railroads in this country each having more than 10,000 employees as of 1957, and the Pullman Company and the Railway Express Agency, 26 companies had at least one supplementary pension plan. *Not one* supplementary pension plan had come into existence through or was then

subject to collective bargaining between management and labor. These companies employed approximately 80% of all railroad employees in 1957. See *Supplementary Pension Plans in the Railroad Industry, A Digest of Representative Plans, for the Subcommittee on Railroad Retirement of the Committee on Labor and Public Welfare*, United States Senate, 86th Cong., 2d Sess. (1961), pp. v-vii. Data from this document is summarized in Appendix C, *infra*. The entire document was received in evidence in this case, without objection, as Brotherhood of Railway Trainmen Exhibit 4.

The railroad industry in general simply does not consider that these pension plans *are or should be* a subject for joint determination by management and labor. Industry practice instead clearly recognizes that, because of the complex nature of pension plans, unilateral establishment and administration of supplementary plans by the carriers alone is essential.[3]

4. Congress itself gave approval to this characteristic of the industry in 1935, *after* enactment in 1926 of the Railway Labor Act phrase "rates of pay, rules and working conditions" and after the 1934 RLA amendments, which did not change the phrase. In the Railroad Retirement Act of 1935, Section 7 provided, in part, that:

> It is recognized that *existing individual carrier . . pension plans are wholly at the option of the carrier*

3. "The type of product which a company chooses to make, its price policies, the location of its plants, its choice of production processes and the assignment of workers are matters of practical importance to its employees. Nevertheless, it is generally agreed that management should have exclusive responsibility for such matters without the intervention of the union. Sometimes *pension plans*, merit increases, subcontracting, and the scheduling of work are treated as management's responsibilities; in other businesses they are regarded as appropriate for joint management-union determination." Cox and Dunlop, *Regulation of Collective Bargaining By The National Labor Relations Board*, 63 Harvard L. Rev. 389, 401 (1950). (Emphasis added.)

> unless in any case express provision is made otherwise, and no restriction is imposed under this chapter upon such plans * * * (49 Stat. 971 (1935).) (Emphasis added.)

The April, 1951, Report of the Temporary Emergency Railroad Wage Panel to the Administrator of the Economic Stablization Agency recognized that Congress in the Railroad Retirement Act has occupied the field of pension benefits for retired railroad employees, to the exclusion of collective bargaining over such benefits.[4]

This plainly accounts for the overwhelming custom and practice in the railroad industry not to make "fringe benefits" subject to collective bargaining.

Furthermore, the *Inland* precedent is inapposite, for that case held that the contributory plan which was there involved fell within the statutory terms "wages" and "conditions of employment," *neither of which appear in the Railway Labor Act.* The court expressly distinguished "rates of pay" by stating that "Certainly the term 'wages' was intended to include something more than 'rates of pay'." (170 F. 2d 247, 255.)

From the standpoint of the meaning of language, the Railway Labor Act does not mention "pensions" nor contain a term which is broad enough to be so construed. Clearly pensions are neither "rules" nor "working con-

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4. The panel, consisting of William M. Leiserson, Lloyd K. Garrison and Frank M. Swacker, recommended a three year moratorium on rates of pay. In the course of this report the panel stated:

> "If prices are held, the railroad workers will be precluded for three years from seeking wage changes. This will be an unprecedented event in that industry, and one which the railroads, as well as the President's representative sought in the negotiations. The limitation upon the employees cannot be circumvented by pressure for 'fringe benefits' (*pensions* and the like), for these are, practically speaking, either regulated by or provided for by statute, and *changes cannot be made without resort to Congress.*" (Emphasis added.)

ditions." It is equally clear that they are not "rates of pay." There are no "rates" and no "pay" involved.

First, the noncontributory plan in the case at bar must be sharply distinguished from a contributory plan, such as was considered in the *Inland* case. In the instant case the carrier would bear 100% of the cost of the plan, and no amount per hour or day would be deducted from his pay and contributed by the employee during his working years. Thus there is no effect on the dollars and cents hourly rate. Moreover, such hourly rates of pay are negotiated separately from and are no part of the negotiations which led to the dispute at bar.

Second, the *Inland* analysis reasoned that every day an employee works his financial status is enhanced to the extent that his pension benefits increase, and that he works under a pledge from the company that certain benefits would be his upon reaching retirement. Thus, there is the certainty of payment which characterizes the contributory pension plan. However, this reasoning does not apply to the noncontributory plan. There is no certainty of benefits. Noncontributory plan benefits are not vested. No compensation characteristics exist, since during the working years the employee has no vested rights to noncontributory pension benefits. Section VII (3) of plan II-B, sought by the three defendants, provides that:

> No Employee prior to his retirement * * * shall have any right or interest in or to any portion of any funds which may be paid into any pension trust * * * and no Employee * * * shall have any right to pension benefit except to the extent provided in this Agreement. (App. 436.).

Thus, the employee who works for a carrier for a number of years and quits to take other work has no right to a pro-rata pension from the carrier. This is typical

among railroad workers. Many workers who enter railroad employment are casual workers who stay for only a short time. For example, of 171,000 new railroad workers in 1949, only 18,300, or 11%, were still employed in 1958. (*1960 Railroad Retirement Board Annual Report* 59 (1961).) Similarly, the employee who is discharged for cause, who dies before he is eligible or whose Railroad Retirement Act benefits cancel private pension benefits receives no non-contributory pension. This cannot be reconciled with the *certainty* and *predictability* of "rates of pay."[5]

5. In the statutory inquiry, it is irrelevant that the plaintiff railroad once signed a pension plan into its collective agreements in a prior negotiation in 1957 (App. 133-136, 201, 344, 345). Temporary actions by isolated individuals cannot be allowed to forever modify statutory requirements. Pensions, as any other subject not within mandatory bargaining, as a matter of law may be withdrawn by either party at the termination of the agreement even though both parties have once agreed. To ignore this principle would nullify the carefully drawn and well settled distinction this Court has made between mandatory and permissive bargaining, in *National Labor Relations Board* v. *Wooster Division of Borg-Warner Corp.*, 356 U. S. 342, 349 (1958): "* * * it is lawful to insist upon matters within the scope of mandatory bargaining and unlawful to insist upon matters without * * *."

II. BARGAINING FOR BENEFITS FOR RETIRED PERSONS.

1. If railroad brotherhoods may bargain and attempt to strike for benefits for retired persons, in the manner demonstrated in the case at bar, a major alteration in

5. *McMullans* v. *Kansas, Oklahoma & G. Ry. Co.*, 229 F. 2d 50 (10th Cir. 1956), cited as authority by the court of appeals, was not a decision passing on the bargainability of non-contributory pensions.

collective bargaining powers and practices will have been created. Such alterations in the established institutions of an entire industry should not be created lightly or by indirection, as the court of appeals has done. The issue deserves candid, deliberative attention, and an instructive opinion.

2. Retired persons are not employees within the meaning of the Railway Labor Act. The brotherhoods had no power or right to bargain and strike for them, for the Railway Labor Act provisions fixing collective bargaining rights and duties are predicated on the existence of the employment relationship and the "craft or class" concept of representation.

Section 1 Sixth exemplifies this underlying principle in defining representative to mean "any person or * * * labor union * * * designated * * * by * * * *employees*, to act *for* * * * *them*." (Emphasis added.) Conversely, only persons who have the status of employees are statutorily empowered to associate and organize. "Employees shall have the right to organize * * * collectively * * *." (Railway Labor Act, § 2 Fourth.) In addition, it is only the category of employed individuals who are given rights under the Railway Labor Act to engage in collective action with employers. "*Employees* shall have the right to * * * bargain collectively through representatives of their own choosing." (Railway Labor Act, § 2 Fourth.) (Emphasis added.) No other group or class is accorded that right. Only "employees" may have their interests in rates of pay, rules, and working conditions handled by representatives. Only "employees" have a voice in the selection of representatives.

To conclude that the 102 retired persons involved in the instant case are "employees" does substantial violence both to the plain language of the Act and to its express

statutory purposes. The relevant portion of the definition is as follows:

> The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service). (§ 1 Fifth.)

Mr. Donald R. Richberg, principal draftsman of the Act and counsel at the time of its enactment for the organized railway employees (including the BRT, ORCB and BLFE) supporting H. R. 718, interpreted the bill's definition of employee (identical to that finally enacted in 1926) as follows:

> Of course, that does not go to the extent of holding that relations which have terminated by both parties, for example, permits them to remain in the relation of employer and employee after a long period of time. (Hearings Before the Committee on Interstate and Foreign Commerce, House of Representatives, 69th Congress, First Session, on H. R. 718, p. 397 (1926).)

The fact that these retired persons no longer are "employees" is shown conclusively by the United States Government forms which the plaintiff's employees voluntarily sign when they retire from the railroad and apply for pensions under the Railroad Retirement Act. (App. 310-312.) They state that services are terminated and all rights relinquished. The express, written understanding between retired persons and the railroad proves that retired persons are not "employees" within the meaning of the Railway Labor Act. They perform no "service" for the plaintiff after their retirement. They are assigned no responsibilities on behalf of the plaintiff. They are under no instructions from the plaintiff. They have no duty whatsoever to obey the plaintiff. The plaintiff has no "authority to supervise and direct the manner of renditions of * * * service."

3. The decision most directly in point is *National Council, Ry. Patrolmen's Union* v. *Sealy*, 152 F. 2d 500 (5th Cir. 1945). That Court held that an employer had no duty to bargain with persons who do not fall within the statutory definition of "employee," and that such non-employees do not enjoy rights. Trustees of the city of Galveston, Texas, operated port facilities which included railroad switching tracks, wharves and warehouses. The operations of the switching tracks were subject to the Act, but the operations of the wharves and warehouses were not. The trustees employed certain policemen to serve as watchmen at the gates to the entire port district. These policemen thereafter brought a suit for a mandatory injunction to compel the city's trustees to treat and bargain with them as "employees" subject to the Act. The district court denied the injunction and the court of appeals affirmed.

The following decisions, although not dealing with retired persons, held unlawful a strike for persons not represented as employees by the striking union: *International Longshoremen's Ass'n* v. *National Labor Relations Board*, 277 F. 2d 681 (D. C. Cir. 1960); *Order of Railway Conductors & Brakemen* v. *Switchmen's Union*, 269 F. 2d 726 (5th Cir.), *cert. den.* 361 U. S. 899 (1959); *Switchmen's Union* v. *Southern Pacific Co.*, 253 F. 2d 81 (9th Cir.), *cert. den.*, 358 U. S. 818 (1958); *Brotherhood of Railroad Trainmen* v. *Smith*, 251 F. 2d 282 (6th Cir.), *cert. den.* 356 U. S. 937 (1958); *Douds* v. *International Longshoremen's Ass'n*, 241 F. 2d 278 (2d Cir. 1957); *Nashville, C. & St. L. Ry.* v. *Railway Employees' Dep't*, 93 F. 2d 340 (6th Cir. 1937), *cert. den.*, 303 U. S. 649 (1938).

4. Indeed, the brotherhoods' bargaining for retired persons under threat of strike, if it were deemed authorized by federal statute, would be the taking of plaintiff's property without due process of law. The original Railroad Retirement Act of 1934 purported to make eligible for

pensions all persons who were employed by the carrier *within one year prior to its enactment*. The retirement fund for payment of these pensions was to be created and sustained by compulsory contributions from the carriers. In this respect the carriers were expected to assume the burden of the cost of pensions to a class of persons from whom no future services might be expected. In *Railroad Retirement Board v. Alton R. R.*, 295 U. S. 330 (1935), the Court declared the 1934 Railroad Retirement Act unconstitutional in its entirety. It held in part that to place the burden of pensions for retired persons upon the carriers was wholly arbitrary and a taking of property from the carriers without due process of law.

Mr. Justice Roberts, writing the opinion for the majority of the court in the *Alton* case, in referring to that section of the Act which stated that all persons who were in carrier service within one year prior to the passage of the Act would be entitled to pensions whether employed or not, stated:

> This clearly arbitrary imposition of liability to pay again for services long since rendered and fully compensated is not permissible legislation. The court below held the provision deprives the railroads of their property without due process, and we agree with that conclusion. (295 U. S. 330, 354.)

Mr. Chief Justice Hughes, for the minority, stated:

> I agree with the conclusion that the requirement that the carriers shall pay retiring allowances to such persons is arbitrary and beyond the power of Congress. (295 U. S. 330, 389.)

This rule of law has not been questioned seriously since the *Alton* case.[6]

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6. All nine members of the Court concurred in this aspect of the case. See 49 Harv. L. Rev. 1 (1935). The subsequent modifications of the Commerce Clause views of the *Alton* case majority have not affected its unanimous due process holding

If it is "beyond the power of Congress," clearly it is beyond the power of the Brotherhoods in the case at bar, to force similar provisions upon the plaintiff with the threat of strike.[7]

5. The court of appeals characterized its holding on this point as an affirmance of a finding of fact. In reality the issue is a question of law—does the undisputed course of bargaining conduct by the defendant brotherhoods amount in law to bargaining and threatening to strike for retired persons? That this issue is a legal judgment, an ultimate conclusion as to the legal consequences of particular, uncontroverted facts, is shown by the fact that the trial court ruled on the issue as a matter of law in Conclusion of Law Number 4. The matter *is* one of law, requiring a judgment which calls for application of the statutory provision for collective bargaining, evaluation of the pertinent policy considerations, and effectuation of the congressional intent.[8]

The court of appeals' attempt to pass the issue as a mere question of fact evades an open answer to the question un-

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7. Cf. Mr. Justice Brandeis in *Dorchy v. Kansas*, 272 U. S. 306, 311 (1926):

> "The right to carry on business—be it called liberty or property—has value. To interfere with this right without just cause is unlawful. The fact that the injury was inflicted by a strike is sometimes a justification. But a strike may be illegal because of its purpose, however orderly the manner in which it is conducted. To collect a stale claim due to a fellow member of the union who was formerly employed in the business is not a permissible purpose. * * * To enforce payment by a strike is clearly coercion. The legislature may make such action punishable criminally, as extortion or otherwise. * * * Neither the common law, nor the Fourteenth Amendment, confers the absolute right to strike."

8. The trial court also made an ultimate conclusion of "fact" to the same effect, which it included among its Findings of Fact. See Findings of Fact No. 14 (App. 457), particularly its conclusory inferences: " * * * but such discussions were not *treated* by the officers of the defendant labor organizations as collective bargaining under the Railway Labor Act * * *" (Emphasis added).

avoidably posed, yet necessarily determines it by summary affirmation. Surely, the important legal issue of what constitutes bargaining cannot be so superficially evaded.

A brief summary of the record of the bargaining between the railroad and the brotherhoods will exemplify petitioner's contention. Demands for increased pensions for the 102 retired former employees in the case at bar were presented orally in the mediation session held February 23, 1961 (they were not listed in the original § 6 notices), and there was never any question that they were being made specifically for increased pensions for the class of individuals who had long since retired. (App. 95, 136, 131, 141, 144, 145.) These demands were *never withdrawn* during the bargaining conferences. The demands for increased pensions for retired persons never were presented in the bargaining conferences as an *alternative* proposal, acceptance of which would *not* be necessary for settlement. When all three unions listed all of their settlement demands and included increased pensions for the 102 retired persons, all of the items listed were presented as necessary for settlement. If settlement was not reached peacefully, the defendant Brotherhoods intended to conclude the issue by strike.

The defendants' failure to denominate specifically their strike as one for increased pensions for retired persons does not help them. The fact is that a strike was never mentioned because no mention was necessary. Everyone engaged in collective bargaining under the Railway Labor Act knows full well that there is always present the clear warning, sometimes expressed but always implied, that unless the carrier grants the unions' demands, a strike may ensue. It is this possibility of strike which assures that the employer will seriously consider unions' proposals. The only means of negativing the threat of a strike for bargaining demands is to expressly state that no strike is intended and

to withdraw the discarded demands from the proposals offered as settlement terms.

The fact that increased pensions for retired persons were not specifically listed on the strike ballot of the ORCB and BLFE cannot support the position that such increased pensions were not part of the objectives of the threatened strike. *None* of the specific sub-demands of the ORCB and BLFE were enumerated in detail on the strike ballot. (App. 446-450.) The strike authorization of the three unions acting jointly is equally general. (App. 313.)

III. EMERGENCY MEDIATION.

1. The court of appeals, in overruling, without reasons, petitioner's contention that the threatened strike was illegal because called during statutory emergency mediation, accorded summary treatment to a point of law which urgently needs clarification, explanation and interpretation. As the matter now stands under the court of appeals' opinion there is no way to ascertain the duties and the rights of parties in emergency mediation.

The district court in the case at bar held that even though emergency mediation was in progress an organization was free to strike where it had not consented to postpone the strike pending mediation. (Conclusions of Law Numbers 7 and 8 (App. 461).) On April 23, 1962, the district court in another case, *Pullman Co.* v. *Order of Railway Conductors and Brakemen*, 44 CCH Labor Cases ¶17,577 (N. D. Ill. 1962), held exactly the contrary.

In both cases the Board requested the organizations to defer strike action pending mediation conferences. In both cases the organizations agreed to participate in such conferences but refused to defer strike action. The district court in the instant case held that a strike would be legal. The court in the *Pullman* case held that:

> Defendants' refusal to postpone their threatened strike pending the efforts of the National Mediation Board to mediate a settlement of the dispute violated the Railway Labor Act. (44 CCH Labor Cases, ¶ 17,577, at p. 26,608.)

The other district court decisions which have coirsidered the legal effects of emergency mediation are not consistent and are not helpful. See *Pittsburgh & Lake Erie R. R.* v. *Brotherhood of Railroad Trainmen*, 179 F. Supp. 271 (W. D. Pa. 1959); *Chicago & North Western Ry. Co.* v. *Order of Railway Telegraphers*, 36 CCH Labor Cases ¶ 65,103, at p. 65,370 (N. D. Ill. 1958), *aff'd on other grounds*, 362 U. S. 330 (1960):

> In merely overruling petitioner's contentions without reasons, the court of appeals in its opinion of May 4, 1962, neither approved nor disapproved either district court analysis and gave no guidance on the problem. Its holding on this point will create confusion and uncertainty in the administration of emergency mediation for the Board, the trial courts and the railroad industry.

2. Section 5 First allows an NMB proffer of emergency mediation "in case any labor emergency is found by it *at any time*." (Emphasis added.) Following this, every procedural step after the proffer is mandatory as each step in Section 5 First is preceded by the word "shall". Thus, the board "shall use its best efforts, by mediation, to bring the parties to agreement." Even if such efforts are unsuccessful the board "shall at once" induce the parties to arbitrate. If arbitration is refused the board "shall" notify the parties that its efforts have failed, and for 30 days thereafter "no change shall be made" in prior agreements or practices.

The Board has no power to dispense with these statutory mandates, if it exercises its discretion and proffers its jurisdiction as it did in the case at bar. (App. 302.) Yet after

re-entering the instant controversy, the Board purported to act informally so to evoke none of the statutory duties of emergency mediation. (App. 304.)

It is a commonplace of federal administrative law that "* * * administrative tribunals are statutory creations and their rights, duties, powers and privileges are of statutory derivation." (Stason and Cooper, *Cases and Other Materials on Administrative Tribunals* 5 (3d Ed. 1957).) The governing statute in this case, the Railway Labor Act, is the sole source of NMB authority. A similar improvised, nonstatutory action by a federal agency was sharply criticized and found unlawful in *Wallach v. Securities & Exchange Commission*, 202 F. 2d 462 (D. C. Cir. 1953). The court stated:

> The Commission may be able to convince Congress that the improvised administrative procedure is preferable to the * * * procedure now provided by the Act. But until it does, we think the statutory provisions lead to no such absurd result as would warrant the Commission's superimposing its judgment upon that of Congress. (202 F. 2d 462, 464.)

Nothing in the Railway Labor Act expressly gives the NMB an extraordinary power to dispense with manifest congressional intention.

To read into the statute an election that the organizations may or may not strike in emergency mediation is wholly inconsistent with the objectives of the Railway Labor Act to avoid interruptions to commerce. To permit such a strike during mediation would also render nugatory Section 5 First of the Act, which provides that "the Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time." (45 U. S. C. § 155 First.) The statutory objectives would hardly be advanced by authorizing resort to self-help in the private interest just at the time when in a labor emergency the

public interest demands uncoerced deliberation under mediatory auspices.

Petitioner submits that certiorari should be granted to resolve this unclear but extremely important point of law. The proper resolution of this question should be that a strike during emergency mediation violates both the Railway Labor Act mediation provisions and the requirement under Section 2 First that all parties must "exert every reasonable effort to make and maintain agreements * * * and to settle all disputes * * * in order to avoid any interruption to commerce or to the operation of any carrier * * *."

IV. RECOVERY OF ATTORNEYS' FEES.

The summary ruling of the court of appeals with respect to the recovery of attorneys' fees in this case conflicts with the decision of the 8th Circuit, *International Ladies' Garment Workers' Union* v. *Donnelly Garment Co.*, 147 F. 2d 246 (8th Cir.), *cert. denied* 325 U. S. 852 (1945) as well as federal principles uniformly recognized by this Court for almost a century. See, *e. g.*, *Oelrichs* v. *Spain*, 5 Wall. 211 (1872).

The *Donnelly* opinion concerned an appeal from a hearing to assess damages and expenses caused by the erroneous issuance and continuance of certain injunctive orders. Even though the injunction bonds, with one exception, did not provide for recovery of attorneys' fees, the defendants sought to recover attorneys' fees apparently on the theory that Section 7 of the Norris-LaGuardia Act by itself would support the action. In rejecting these contentions the court ruled that Section 7's requirement of a bond as a condition precedent directly contradicts the notion that the Act is self-executing. The court stated:

> We think the statutory requirement of a bond upon certain conditions in an amount to be fixed by the court

> is conclusive evidence of the legislative intention that the bond should be the evidence and measure of plaintiff's liability and defendant's protection. (147 F. 2d 246, 252.)

The court also held that the words of Section 7 could not be read into the bonds. Moreover, in pointing out that the defendants were not entitled to attorneys' fees simply because the decrees under which the bonds were given were erroneous, the court observed:

> The loss if any caused defendant by the errors of the court is *damnum absque injuria*, one of the unavoidable incidents of litigation to which parties are exposed. (147 F. 2d 246, 253.)[9]

In referring to defendants' failure to challenge the amount, the scope of coverage, or the appropriateness of the forms of the bonds in the *Donnelly* case, a failure quite like that of the defendants here, the district court stated:

> Any limitation in the scope of coverage or any inadequacy in the amount of these bonds has clearly been waived by the defendants. (*Donnelly Garment Co. v. International Ladies' Garment Workers Union*, 55 F. Supp. 572, 580 (W. D. Mo. 1944).)

Application of the above rules to the present case establishes that the court of appeals' opinion is in conflict with that of the Eighth Circuit, and that no precedent supports the brotherhood's recovery of attorneys' fees. In this case, as in *Donnelly*, the court did not require a bond conditioned to pay attorneys' fees. Even though it was ultimately concluded in the *Donnelly* case that the Norris-LaGuardia Act governed to preclude any injunction, the defendants were not allowed to recover attorneys' fees because the injunction

9. However, recovery of attorneys' fees was allowed on a bond given under Equity Rule 74 because it provided therefor. The attorneys' fees recoverable were limited to those in connection with the particular proceeding under which the bond was given and not the entire litigation.

bonds had not provided for them. That should be the result in the case at bar.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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July , 1962.

APPENDIX A.

In the United States Court of Appeals

For the Seventh Circuit.

No. 13447 September Term, 1961—April Session, 1962.

Elgin, Joliet & Eastern Railway Company, *Plaintiff-Appellant*, v. Brotherhood of Railroad Trainmen, et al., *Defendants-Appellees*.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

May 4, 1962.

Before Duffy, Knoch and Kiley, *Circuit Judges*.

Duffy, *Circuit Judge*. This suit was brought against the Brotherhood of Railroad Trainmen (BRT), Brotherhood of Locomotive Firemen and Enginemen (BLFE) and Order of Railway Conductors and Brakemen (ORCB) to restrain a strike scheduled to commence at 6 a.m. on May 20, 1961. The District Court entered a temporary restraining order on May 19, 1961. This restraining order was continued in effect by agreement of the parties, pending final action by the District Court after a hearing on the merits.

On June 21, 1961, after the hearing on the merits, the District Court entered Findings of Fact and Conclusions of Law favorable to the defendants; the temporary restraining order was dissolved and the action was dismissed

at plaintiff's costs. Plaintiff forthwith filed a notice of appeal and moved for an injunction restraining defendants from striking pending said appeal. On June 22, 1961, the District Court granted plaintiff's motion for an injunction pending appeal stating that it did so pursuant to the provisions of Rule 62(c), F.R.C.P. "and the inherent powers of the Court." Defendant brotherhoods appealed from the order of June 22, 1961, granting the injunction pending appeal. These appeals have been designated in this Court as Nos. 13445 and 13447, and are being separately considered.

Plaintiff is a common carrier engaged in interstate commerce by railroad and is a "carrier" within the meaning of that term as defined in the Railway Labor Act. Plaintiff's railroad system connects and interchanges freight with thirty-three common carriers by rail which enter the city of Chicago. Its capital stock is owned by the United States Steel Corporation.

The defendant brotherhoods are labor organizations, national in scope, and are subject to the provisions of the Railway Labor Act. The BRT is exclusive bargaining representative for 1200 employees, the BLFE for 400 firemen and the ORCB for 55 road conductors.

The dispute between the parties concerns non-contributory pensions supplemental to Railroad Retirement Act benefits. A pension plan known as H-B had expired by its terms on October 31, 1959. This pension plan as well as a previous plan was included in collective bargaining agreements between plaintiff and each of the defendants, BRT, BLFE and ORCB, on behalf of the respective class or craft of plaintiff's employees represented by such labor organizations.

The brotherhood defendants sought pension benefits different from and in addition to those available under H-B.

On October 1, 1959, each brotherhood served notice on plaintiff pursuant to Section 6 of the Railway Labor Act. The notice was as follows:

> "Kindly consider this as a thirty (30) day notice under the provisions of Section 6 of the amended Railway Labor Act to extend the current Non-Contributory Pension Agreement [H-B] between the Elgin, Joliet and Eastern Railway Company and the [BRT, ORC&B, and BLFE] effective November 1, 1957, until such date when the United States Steel Workers reach an agreement on a Non-Contributory Pension Plan, after which date, the above referred to Organization[s] shall have the option of substituting the new pension plan (being negotiated by the United States Steel Workers) in place of the pension plan now in effect covered by the aforementioned pension agreement; and-or also have the option to renew, modify; or change the above referred to pension agreement as may be deemed advisable."

All three brotherhoods requested joint handling of their notices, and this procedure was followed between the plaintiff and the brotherhoods in the collective bargaining conferences which followed. Paul H. Verd, Vice President of plaintiff, was its principal negotiator. He offered to grant extensions of plan H-B for periods of three years, two years or one year, but refused to consider extensions for shorter periods as requested by the brotherhoods.

At the date of the service of the Section 6 notice, a strike was in progress called by employees of United States Steel. This strike was settled about January 1, 1960, and in the settlement it was agreed there would be changes in the non-contributory pension plan between United States Steel Corporation and its employees represented by United States Steel Workers. A copy of the new plan was not available to the brotherhoods representing plaintiff's employees for some months thereafter. This new plan was known as Plan H-CR and was not discussed by

Mr. Verd until the joint conference held on February 23, 1961.

During the collective bargaining conferences, the brotherhoods urged plaintiff to restore or increase benefits theretofore paid to retired employees of plaintiff. Mr. Verd was of the opinion that he was not required by the Railway Labor Act to bargain with employees of plaintiff concerning the pension plan sought by the brotherhoods. However, he did, in fact, bargain upon the plan.

Joint conferences with respect to the Section 6 notice were held on October 26 and 27, 1959, without an agreement being reached. Largely due to the steel strike, a third conference was not held until July 29, 1960. Again, no agreement was reached.

The brotherhoods then requested intervention of the National Mediation Board. On August 22, 1960, the Board advised plaintiff and the brotherhoods that it had taken jurisdiction. The first joint mediation session was held on November 30, 1960. No further meetings were held until February 23, 1961. The final joint mediation conference was held on February 27, 1961, but no agreement was reached.

On March 8, 1961, the National Mediation Board proffered arbitration. The plaintiff accepted, but on March 10, 1961, all of the brotherhoods jointly rejected arbitration.

By letters dated March 13 and March 16, 1961, mediation services were terminated by the Board. On April 14, 1961, plaintiff sent telegrams to officials of defendant brotherhoods requesting further conferences which were held on April 19, 21 and 24, 1961, without an agreement being reached.

On May 16, 1961, the Board, by telegram, advised all parties that defendants had authorized a strike to begin

May 20, 1961, at 6 a.m. and requested the brotherhoods to defer strike action. However, the brotherhoods refused to comply with this request. On May 18, 1961, at 10 p.m., the National Executive Officials of the three defendant brotherhoods posted a notice on plaintiff's property, giving authority for a strike effective Saturday, May 20, 1961, at 6 a.m.

Although plaintiff's brief lists twenty-eight separately stated "contested issues," we think the issues in this case may be considered under five subheads.

I

Plaintiff contends the strike scheduled for May 20, 1961, was illegal because the National Mediation Board had not completed its emergency mediation. Plaintiff argues the Mediation Board's request of May 16, 1961, for further meeting, started the running of a "reasonable time" during which the strike would be illegal. Plaintiff does not suggest what period of time would meet such a test. It does not contend that any second 30-day *status quo* period was involved. The District Court pointed out that the resumption of mediation was on the agreement that defendants did not waive their right to strike pursuant to notices already served. We hold this first contention of plaintiff must be overruled.

II

Plaintiff also contends that the demands of the defendant brotherhoods regarding pension agreements were not a subject of mandatory collective bargaining because not included within the phrase "rates of pay, rules, and working conditions" as those terms are used in Sections 2 First, 2 Seventh and 6 of the Railway Labor Act (45 U. S. C. 152, 156). As a corollary to this contention, plaintiff alleges

that the brotherhoods may not lawfully strike for increased non-contributory pensions for retired persons.

The Railway Labor Act does not specifically mention pension plans as a subject of mandatory collective bargaining. However, this Court, in *Inland Steel Co. v. NLRB*, 7 Cir., 170 F. 2d 247, construing similar language in the National Labor Relations Act, held that pension plans were properly the subject of mandatory collective bargaining. In spite of the difference in terminology between the National Labor Relations Act and the Railway Labor Act, we think the conclusion reached in the *Inland* case is applicable here. *McMullans, et al.* v. *Kansas, Oklahoma, and Gulf Railway Co., Inc., et al.*, 10 Cir., 229 F. 2d 50, 54-55.

We do not reach the contention that the brotherhoods may not lawfully strike for increased non-contributory pensions for retired persons. The District Court in its Findings of Fact stated, ". . . Neither the Section 6 Notices served by the labor organizations nor the strike ballots taken by them referred to retired employees. Officers of the BRT, ORCB, and BLFE never at any time threatened to strike against the plaintiff on account of the position of such retired employees. . . ." In the absence of a showing that such Findings of Fact were clearly erroneous (Rule 52(a), F. R. C. P.), this Court is bound by them and the issue of the lawfulness of a strike to obtain increased pension benefits for retired employees is, in fact, a moot question.

III

Plaintiff further contends that the scheduled strike was illegal in that the brotherhoods failed to make every reasonable effort to settle all disputes and did not accept arbitration.

Arbitration under the Railway Labor Act is voluntary, not compulsory. Section 7 First of the Railway Labor Act

(45 U.S.C. 157) provides in part: "That the failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this chapter or otherwise."

While it is possible that a refusal to arbitrate might be a factor in determining whether every reasonable effort was made to settle all disputes, the refusal to arbitrate in and of itself does not constitute a failure to make every reasonable effort to settle all disputes. To hold that the failure to arbitrate, *per se*, is the failure to exert every reasonable effort to make agreements and settle all disputes, would make a nullity of Section 7.

Plaintiff relies on *Brotherhood of Railroad Trainmen, Enterprise Lodge, No. 27, et al. v. Toledo, Peoria & Western Railroad*, 321 U.S. 50. The Supreme Court, in that case, held that Section 8 of the Norris-LaGuardia Act (29 U.S.C. 108) would bar a complainant from injunctive relief if he had not submitted the dispute to arbitration. The Court stated, at page 63:

> "Respondent's failure or refusal to arbitrate has not violated any obligation imposed upon it, whether by the Railway Labor Act or by the Norris-LaGuardia Act. No one has recourse against it by any legal means on account of this failure. *Respondent is free* to arbitrate or not, as it choses. But if it refuses, it loses the legal right to have an injunction issued by a federal court or, to put the matter more accurately, it fails to perfect the right to such relief. This is not compulsory arbitration. It is compulsory choice between the right to decline arbitration and the right to have the aid of equity in a federal court."

It must be conceded that the language used by the Court, " . . . and the right to have the aid of equity in a federal court" is very broad. However, construing it in context with the other language used in the paragraph

hereinbefore quoted, we hold Section 8 is not applicable to the brotherhoods in the case at bar. The brotherhoods were not seeking injunctive relief and failure to arbitrate did not violate the Railway Labor Act.

The application of Section 4 of the Norris-LaGuardia Act (29, U.S.C. 104) is not affected by the failure of the brotherhoods to arbitrate. Section 4 is applicable to the dispute under consideration and it operates so as to prevent the granting of injunctive relief to plaintiff.

We hold that plaintiff's argument that defendant brotherhoods failed to make every reasonable effort to settle the dispute, is without merit.

IV

Plaintiff argues that conduct which violates the provisions of the Railway Labor Act may be enjoined in spite of the Norris-LaGuardia Act. However, it is admitted by plaintiff that the disputed question is a "major dispute." The Supreme Court has held that Section 4 of the Norris-LaGuardia Act is applicable to "major disputes" within the meaning of the Railway Labor Act. *Order of Railroad Telegraphers, et al. v. Chicago & North Western Railway Co.*, 362 U.S. 330.

This question needs no further discussion here. Plaintiff's argument is based upon the proposition that the brotherhoods' conduct in this case violated the Railway Labor Act. We have held to the contrary. We hold the District Court was correct in holding that it was deprived of jurisdiction to issue an injunction by reason of the provisions of the Norris-LaGuardia Act.

V

Plaintiff urges error on the part of the trial court in awarding attorney's fees to the defendant brotherhoods. We find this contention to be without merit. Section 7 of the Norris-LaGuardia Act (29 U.S.C. 107) provides in part:

> "No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court."

There was no error in the awarding of attorney's fees to the defendant brotherhoods.

We have considered all of plaintiff's contentions and find them to be without merit.

The judgment of the District Court is

AFFIRMED.

UNITED STATES COURT OF APPEALS,

For The Seventh Circuit,

Chicago 10, Illinois.

Friday, May 4, 1962.

Before

Hon. F. Ryan Duffy, *Circuit Judge*,
Hon. Win G. Knoch, *Circuit Judge*,
Hon. Roger J. Kiley, *Circuit Judge*.

Elgin, Joliet and Eastern Railway Company *Plaintiff-Appellant*, No. 13444 *vs.* Brotherhood of Railroad Trainmen, et al., *Defendants-Appellees*.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court entered therein on June 21, 1961, in this cause appealed from be, and the same is hereby, affirmed with costs, in accordance with the opinion of this Court filed this day.

APPENDIX B.

Section 1 of the Norris-LaGuardia or Anti-Injunction Act of 1932, 47 Stat. 70, 29 U.S.C., § 101, provides:

> That no court of the United States, as herein defined, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this Act; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this Act.

Section 4 of the Norris-LaGuardia or Anti-Injunction Act of 1932, 47 Stat. 70, 29 U.S.C., § 104, provides:

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:
>
> (a) Ceasing or refusing to perform any work or to remain in any relation of employment;
>
> (b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 3 of this Act;
>
> (c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;
>
> (d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 3 of this Act.

Section 5 of the Norris-LaGuardia or Anti-Injunction Act of 1932, 47 Stat 71; 29 U.S.C., § 105, provides:

No court of the United States shall have jurisdiction to issue a restraining order or temporary or permanent injunction upon the ground that any of the persons participating or interested in a labor dispute constitute or are engaged in an unlawful combination or conspiracy because of the doing in concert of the acts enumerated in Section 4 of this Act.

Section 7 of the Norris-LaGuardia or Anti-Injunction Act of 1932, 47 Stat. 70, 29 U.S.C., § 107, provides:

No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as herein defined, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no

injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That, as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also to the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property: *Provided, however*, That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erro-

neous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.

The undertaking herein mentioned shall be understood to signify an agreement entered into by the complainant and the surety upon which a decree may be rendered in the same suit or proceeding against said complainant and surety, upon a hearing to assess damages of which hearing complainant and surety shall have reasonable notice, the said complainant and surety submitting themselves to the jurisdiction of the court for that purpose. But nothing in this section contained shall deprive any party having a claim or cause of action under or upon such undertaking from electing to pursue his ordinary remedy by suit at law or in equity.

Section 9 of the Norris-LaGuardia or Anti-Injunction Act of 1932, 47 Stat. 70, 29 U.S.C., § 72, provides:

No restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the court in the record of the case prior to the issuance of such restraining order or injunction; and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in said findings of fact made and filed by the court as provided herein.

Section 13 of the Norris-LaGuardia or Anti-Injunction Act of 1932, 47 Stat. 70, 29 U. S. C., § 113, provides:

SEC. 13. When used in this Act, and for the purposes of this Act—

(a) A case shall be held to involve or to grow out of

a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as hereinafter defined) of "persons participating or interested" therein (as hereinafter defined).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment; regardless of whether or not the disputants stand in the proximate relation of employer and employee.

(d) The term "court of the United States" means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia.

Section 1; Fifth, of the Railway Labor Act as amended, 44 Stat. 577, 48 Stat. 1185, 49 Stat. 1189, 54 Stat. 785, 45 U. S. C., § 151, Fifth, provides:

Fifth. The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is conferred upon it to enter orders amending or interpreting such existing orders: *Provided, however*, That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this Act or by the orders of the Commission. The term "employee" shall not include any individual while such individual is engaged in the physical operations consisting of the mining of coal, the preparation of coal, the handling (other than movement by rail with standard locomotives) of coal not beyond the mine tipple, or the loading of coal at the tipple.

Section 2 of the Railway Labor Act as amended, 44 Stat. 577, 48 Stat. 1185, 45 U. S. C., §§ 151a and 152, provides:

SEC. 2. Section 2 of the Railway Labor Act is amended to read as follows:

"GENERAL PURPOSES

"(1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to

provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

"GENERAL DUTIES.

"First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

"Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

"Third. Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

"Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers or agents, shall deny or in any way question the right of

its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this Act shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

"Fifth. No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this Act, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way.

"Sixth. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided*, (1) That the place so specified shall be situated upon the line of the carrier involved or as

otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: *And provided further*, That nothing in this Act shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

"Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act.

"Eighth. Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this Act, and in such notices there shall be printed verbatim, in large type, the third, fourth, and fifth paragraphs of this section. The provisions of said paragraphs are hereby made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.

"Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Media-

tion Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

"Tenth. The willful failure or refusal of any carrier, its officers, or agents to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $1,000 nor more than $20,000 or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any United States attorney to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States: *Provided*, That nothing in this Act shall be construed to require an individual employee to render labor or

service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service without his consent.

"Eleventh. Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—

"(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided*, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

"(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership: *Provided*, That no such agreement shall be effective with respect to any

individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

"(c) The requirment of membership in a labor organization in an agreement made pursuant to subparagraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in the First Division of paragraph (h) of section 153 of this title, defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) of this paragraph shall provide for deductions from his wages for periodic dues, initation fees, or assessments payable to any labor organization other than that in which he holds membership: *Provided,* however, That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: *Provided, further,* That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

"(d) Any provisions in paragraphs Fourth and Fifth of this section in conflict herewith are to the extent of such conflict amended."

Section 5 of the Railway Labor Act as amended, 44 Stat. 577, 48 Stat. 1185, 62 Stat. 991, 63 Stat. 107, 45 U. S. C. § 155, provides:

SEC. 5. Section 5 of the Railway Labor Act is amended to read as follows:

"FUNCTIONS OF MEDIATION BOARD.

"SEC. 5. First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

"(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

"(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

"The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

"In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 10 of this Act) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this Act.

"If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts

have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 10 of this Act, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

"Second. In any case in which a controversy arises over the meaning or the application of any agreement reached through mediation under the provisions of this Act, either party to the said agreement, or both, may apply to the Mediation Board for an interpretation of the meaning or application of such agreement. The said Board shall upon receipt of such request notify the parties to the controversy, and after a hearing of both sides give its interpretation within thirty days.

"Third. The Mediation Board shall have the following duties with respect to the arbitration of disputes under section 7 of this Act:

"(a) On failure of the arbitrators named by the parties to agree on the remaining arbitrator or arbitrators within the time set by section 7 of this Act, it shall be the duty of the Mediation Board to name such remaining arbitrator or arbitrators. It shall be the duty of the Board in naming such arbitrator or arbitrators to appoint only those whom the Board shall deem wholly disinterested in the controversy to be arbitrated and impartial and without bias as between the parties to such arbitration. Should, however, the board name an arbitrator or arbitrators not so disinterested and impartial, then, upon proper investigation and presentation of the facts, the Board shall promptly remove such arbitrator.

"If an arbitrator named by the Mediation Board, in accordance with the provisions of this Act, shall be removed by such Board as provided by this Act, or if such an arbitrator refuses or is unable to serve, it shall be the duty of the Mediation Board, promptly to select another arbitrator in the same manner as provided in this Act for an original appointment by the Mediation Board.

"(b) Any member of the Mediation Board is authorized to take the acknowledgment of an agreement to arbitrate under this Act. When so acknowledged, or when acknowledged by the parties before a notary public or the clerk of a district court or a circuit court of appeals of the United States, such agreement to arbitrate shall be delivered to a member of said Board or transmitted to said Board to be filed in its office.

"(c) When an agreement to arbitrate has been filed with the Mediation Board, or with one of its members, as provided by this section, and when the said Board has been furnished the names of the arbitrators chosen by the parties to the controversy, it shall be the duty of the Board to cause a notice in writing to be served upon said arbitrators, notifying them of their appointment, requesting them to meet promptly to name the remaining arbitrator or arbitrators necessary to complete the Board of Arbitration, and advising them of the period within which, as provided by the agreement to arbitrate, they are empowered to name such arbitrator or arbitrators.

"(d) Either party to an arbitration desiring the reconvening of a board of arbitration to pass upon any controversy arising over the meaning or application of an award may so notify the Mediation Board in writing, stating in such notice the question or questions to be submitted to such reconvened Board. The Mediation Board shall thereupon promptly communicate with the members of the Board of Arbitration, or a subcommittee of such Board appointed for such purpose pursuant to a provision in the agreement to arbitrate, and arrange for the reconvening of said Board of Arbitration or subcommittee, and shall notify the respective parties to the controversy of the time and place at which the Board, or the subcommittee, will meet for hearings upon the matters in controversy to be submitted to it. No evidence other than that contained in the record filed with the original award shall be received or considered by such recon-

vened Board or subcommittee, except such evidence as may be necessary to illustrate the interpretations suggested by the parties. If any member of the original Board is unable or unwilling to serve on such reconvened Board or subcommittee thereof, another arbitrator shall be named in the same manner and with the same powers and duties as such original arbitrator.

"(e) Within sixty days after the approval of this Act every carrier shall file with the Mediation Board a copy of each contract with its employees in effect on the 1st day of April 1934, covering rates of pay, rules, and working conditions. If no contract with any craft or class of its employees has been entered into, the carrier shall file with the Mediation Board a statement of that fact including also a statement of the rates of pay, rules and working conditions applicable in dealing with such craft or class. When any new contract is executed or change is made in an existing contract with any class or craft of its employees covering rates of pay, rules or working conditions, or in those rates of pay, rules, and working conditions of employees not covered by contract, the carrier shall file the same with the Mediation Board within thirty days after such new contract or change in existing contract has been executed or rates of pay, rules, and working conditions have been made effective.

"(f) The Mediation Board shall be the custodian of all papers and documents heretofore filed with or transferred to the Board of Mediation bearing upon the settlement, adjustment, or determination of disputes between carriers and their employees or upon mediation or arbitration proceedings held under or pursuant to the provisions of any Act of Congress in respect thereto; and the President is authorized to designate a custodian of the records and property of the Board of Mediation until the transfer and delivery of such records to the Mediation Board and to require the transfer and delivery to the Mediation Board of any and all such papers and documents filed with it or in its possession."

Section 6 of the Railway Labor Act as amended, 44 Stat. 577, 48 Stat. 1185, 45 U. S. C., § 156, provides:

> SEC. 6. Section 6 of the Railway Labor Act is amended to read as follows:
>
> "SEC. 6. Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

APPENDIX C.

Company	Employees	Effective Date	By whom established
The Pullman Co.	7,729	July 1, 1947	Bd. of Directors
Wabash R. R. Co.	888	Jan. 1, 1955	Bd. of Directors
Reading Co.	561	May 1, 1954	Bd. of Directors
Southern Pacific Co.	43,186	Jan. 1, 1903	Bd. of Directors.
Norfolk & Western Railway Co.	11,437	Dec. 1, 1938	Company
Chicago, Rock Island & Pacific R. R. Co.	800	July 1, 1940	Company
Chesapeake & Ohio Ry. Co.	3,087	June 1, 1946	Company
Santa Fe Railway	5,263	Oct. 1, 1953	Company
The Baltimore & Ohio	25,744	Mar. 1, 1953	Company
Seaboard Airline R. R. Co.	1,092	Jan. 1, 1956	Company
Illinois Central R. R.	31,796	July 1, 1901	Bd. of Directors
Southern Pacific Transport Co.	520	July 2, 1930	Bd. of Directors
Chicago, Burlington & Quincy R. R. Co.	2,482	Jan. 1, 1952	Company
Southern Railway	2,774	June 1, 1953	Company
Railway Express Agency, Inc.	4,031	Sept. 26, 1929	Company
New York Central R. R.	55,185	Nov. 1, 1946	Company
Union Pacific R. R. Co.	1,968	Jan. 1, 1903	Company
Northern Pacific Ry. Co.	1,694	Oct. 1, 1937	Company
Missouri Pacific	not stated	Jan. 1, 1947	Company
Chicago, Milwaukee St. Paul & Pacific R. R. Co.	674	July 1, 1943	Trustees of the R.R.
St. Louis-San Francisco Ry. System	874	Aug. 1, 1953	Company
Chicago & North Western	19,400	Jan. 1, 1901	Bd. of Directors
New York, New Haven & Hartford R. R. Co.	494	Jan. 31, 1951	Bd. of Directors
New York Central	13,603	Nov. 1, 1946	Company
Southern Pacific-Texas & New Orleans R. R. Co.	11,461	Jan. 1, 1903	Bd. of Directors
Erie R. R. Co.	3,447	Jan. 1, 1945	Company
Great Northern Ry Co.	1,408	Sept. 16, 1916	Company

SUPREME COURT, U. S.

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 246

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY, A CORPORATION,
Petitioner,

vs.

BROTHERHOOD OF RAILROAD TRAINMEN, ET AL.,
Respondents.

BRIEF ON BEHALF OF RESPONDENTS BROTHERHOOD OF LOCOMOTIVE FIREMEN & ENGINEMEN, ET AL., AND ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, ET AL., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BURKE WILLIAMSON,
JACK A. WILLIAMSON,
39 South La Salle Street,
Chicago 3, Illinois,
Attorneys for above named Respondents.

THE DONNELLEY-WARREN PRINTING COMPANY, CHICAGO 56

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QUESTIONS PRESENTED.

The above named respondents will hereinafter be called "respondents". Of the six questions which petitioner states are involved here (Petn. 2-3), respondents consider that the first is the only one squarely presented, and that it should be stated, in the terms and circumstances of this case as required by this Court's Rule 23-1(c), as follows:

1. Whether the request of railroad employees for an agreement with the carrier providing a new non-

contributory pension plan in substitution for an expiring plan which had previously been negotiated through collective bargaining presents an issue which is subject to mandatory collective bargaining under the Railway Labor Act.

Respondents will hereinafter state their reasons for believing that the other five questions stated in the petition are not properly presented here.

STATEMENT OF THE CASE.

Petitioner's statement of the case (Petn. 3-4) does not contain a description of the underlying dispute or the manner in which this dispute arose. At the beginning of the Argument section of this brief, respondents will summarize such facts on this subject as they deem essential to a consideration of the question presented regarding bargainability of pension plans.

Petitioner's statement of the case contains no reference, as required by Rule 23-1(e) of this Court, to *any* facts relative to the other questions sought to be presented, namely, a threatened strike for retired persons (Question 2), the status of the Mediation Board in this dispute (Questions 3-5), or the allowance of attorneys' fees (Question 6). Respondents will make brief reference to such facts under paragraphs 2-6 of following Section of this brief entitled "Reasons for Denying the Writ."

REASONS FOR DENYING THE WRIT.

Respondents here state briefly their answers to petitioner's declared reasons for granting certiorari (Petn. 4-5), following the order of the "Questions Presented" as they appear in the petition, pages 2-3:

1. Although this Court has not decided the precise issue presented here concerning bargainability of a proposed

new pension plan, the scope of mandatory collective bargaining under the Railway Labor Act has been fully considered in connection with a case in which a far more difficult question as to bargainability was presented. *Order of Railroad Telegraphers* v. *Chicago and Northwestern R. Co.*, 362 U. S. 330 (1960). The dispute in that case was held bargainable, and the rationale of that decision leads to the conclusion, *a fortiorari*, that pension plans such as those involved here are bargainable. Decisions by courts of appeals dealing with similar questions are uniform in favor of bargainability. *Inland Steel Co.* v. *N. L. R. B.*, 7th Cir., 170 F. 2d 247, Cert. denied, 336 U. S. 960 (1948). *McMullans* v. *Kansas, Oklahoma and Gulf Railway Co.*, 10th Cir., 229 F. 2d 50 (1956). The question presented is not of such importance that review here is needed.

2. The question whether employees may threaten to strike for increased pensions for retired persons is not properly presented because this case on its facts, as found by the District Court, did not involve that issue. The District Court found that no such threat was made (Petn. A-16, App. 457). Certiorari to review this question is subject to the "clearly erroneous" rule: *Rudolph* v. *United States*, decided June 18, 1962, Advance Reports No. 5, 8 L. ed. 2d 484, at 486.

3-5. The questions sought to be raised concerning the legal position of the National Mediation Board in relation to the dispute involved in this case are not properly raised here because of the District Court's findings and conclusions (App. 458-461) that the Mediation Board formally terminated its services before the strike date was set and that mediation under the Railway Labor Act was not thereafter resumed. These questions sought to be presented are, at most, mixed questions of law and fact and are governed by the "clearly erroneous" rule referred to in the preceding paragraph, and in view of the District Court's findings, are largely academic.

6. The question sought to be raised concerning allowance of attorneys' fees is not properly presented here, and no conflict has been shown between the holding here and that in *International Ladies' Garment Workers' Union v. Donnelly Garment Co.*, 8th Cir., 147 F. 2d 246, Cert. denied 325 U. S. 852 (1945). The point petitioner seeks to make is based on the terms and conditions of the injunction bond, but such terms and conditions do not appear in the record brought here. The decision in the *Donnelly* case is based on the fact that the trial court did not consider Norris-LaGuardia applicable and did not require a bond in accordance with Section 7 of the Act. That is not the case presented here.

ARGUMENT.

Bargainability of Non-contributory Pensions.

This question must be considered in the context of its factual origin, "in the terms and circumstances" of this case (Rule 23-1(c)). The pension plan dispute involved here grew out of the unions' request, dated October 1, 1959, for a more liberal plan to replace one which had resulted from a collective bargaining agreement made July 19, 1957. This agreement, which had followed an earlier agreement, also collectively bargained (App. 454), provided that it would be effective "until October 31, 1959, and thereafter until changed or modified in accordance with the provisions of the Railway Labor Act, as amended" (App. 345). This agreement shows on its face that it was the result of successful mediation under the aegis of the National Mediation Board (App. 344-346).

The unions' request for an improved plan was made by notices (App. 10-11) purporting to be Railway Labor Act "Section 6 notices" (45 U. S. C. § 156). The issue was

discussed at two conferences during October, 1959 with management, and the carrier then formally declined the request and made certain counter-offers (App. 383-384). Efforts during the following eighteen months to settle the matter through negotiation and mediation failed, and a strike was set for May 20, 1961 (App. 11-16).

The above events are simply a part of the factual background of the dispute involved in this case, and as such, they are necessarily bound up in the question presented as to the bargainability of the pension issue. The employees have understandably believed that any question about the bargainability of it was settled in 1957 on this railroad, *i.e.*, that the parties have allowed the collective bargaining process to define its own scope in a manner which includes the field of pensions. Therefore, whereas petitioner contends that the Court of Appeals' decision, for the first time in the railroad industry, extends mandatory bargaining to pensions (Petn. 4), it appears to respondents that this extension actually occurred, at least on this railroad, some five years before the decision in question.

Nevertheless, the question whether pension plans are bargainable in the railroad industry generally is indeed an important one. This is so whether pensions continue to be called "fringe benefits" (Petn. 4), or whether they are eventually described in terms more in keeping with their value in the minds of railroad employees of today. The decisions of the District Court and the Court of Appeals on the question presented here are of great importance to the employees of this railroad. A "grand amen" by this Court would obviously be of even greater importance to them.

Even so, respondents cannot agree with petitioner that this case presents a question of such general importance that it ought to be decided by this Court. This is because the status of the case law which is pertinent to this ques-

tion, including a recent decision by this Court, makes a review at this time unnecessary.

In *Order of Railroad Telegraphers* v. *Chicago and Northwestern R. Co.*, 362 U. S. 330 (1960), the scope of mandatory collective bargaining under the Railway Labor Act was directly involved. The dispute there was over a union request for a contract change which would require union consent before the carrier could abolish certain jobs. At the outset of the dispute the carrier took the position that this issue was non-bargainable because it had an unlawful object, *i.e.*, an improper invasion into the field of management functions in the operation of the railroad, and was an attempt to interfere with Interstate Commerce Commission duties under the Interstate Commerce Act (49 U. S. C. §§ 1-27). The Court rejected these contentions and held that the dispute presented a bargainable issue under the Railway Labor Act. The Court said (362 U. S. at 338):

> "In an effort to prevent a disruption and stoppage of interstate commerce, the trend of legislation affecting railroads and railroad employees has been to broaden, not narrow, the scope of subjects about which workers and railroads may or must negotiate and bargain collectively. Furthermore, the whole idea of what is bargainable has been greatly affected by the practices and customs of the railroads and their employees themselves. It is too late now to argue that employees can have no collective voice to influence railroads to act in a way that will preserve the interests of the employees as well as the interests of the railroad and the public at large."

To apply the reasoning in *Telegraphers* to the instant case, respondents submit that retirement pension plans such as those here involved (App. 409-439), providing payments based on average earnings, years of service and attained age, are so obviously a form of deferred compensation for work done that the point need not be labored. If the Railway Labor Act phrase "rates of pay, rules, or

working conditions" does not cover this subject, a radically different interpretive approach to the question will have to be used than that adopted in *Telegraphers*.

Moreover, the reference in the above to "the practices and customs of the railroads and their employees themselves" has particular significance as applied to the practice established between the EJ & E railroad and its employees in 1957 of treating pensions as bargainable. Petitioner stresses the fact that as of 1957, a great majority of the larger railroads in this country with pension plans had established them without collective bargaining (Petn. 8-9). Respondents submit that this cannot under any conceivable theory put the pension agreement which was collectively bargained on the EJ & E railroad in 1957 under suspicion of having an unlawful object, or leave any doubt that the parties considered the field one in which they shared mutual responsibility for handling through Railway Labor Act procedures.

In the *Telegraphers* case, four members of the Court dissented on the question of bargainability, chiefly on the ground that they considered the union demand for unilateral veto power over abolishment of jobs was unlawful under the Interstate Commerce Act. The dissenting opinion of Mr. Justice Whittaker, with whom Justices Frankfurter, Clark and Stewart joined, made this clear as follows:

362 U. S. at 357:

> "* * * It is not to be doubted that a carrier and a labor union representing the carrier's employees, lawfully may bargain about and agree upon matters in mitigation of hardships to employees who are displaced by railroad unifications or abandonments; but they may not agree, nor may any regulatory body order, that no jobs shall be abolished, and thus defeat unifications or abandonments required in the public interest. * * *"

362 U. S. at 359-360:

> "• • • Here, as has been shown, the Union's demand was in derogation of the provisions and policies of the Interstate Commerce Act. It could not therefore be a lawfully bargainable subject within the purview of § 2, First, of the Railway Labor Act. The carrier could not lawfully accept it, and hence a strike to force its acceptance would be one to force a violation of the law."

Again comparing *Telegraphers* to this case, it is apparent that the difficult questions of overlapping fields of interest, which in *Telegraphers* included the field of employee interests in job security as opposed to the field of management prerogatives and the field of Interstate Commerce Commission jurisdiction, are not presented in the instant case. The question of changing or not changing a pension plan has no significant element of interference with management's control of railroad operations, and involves no possible interference with the duties of the Interstate Commerce Commission. It follows that the factors which divided the Court in *Telegraphers* are not present here. That case provides a definition of the scope of mandatory bargaining under the Railway Labor Act which is clearly broad enough to make review in the instant case unnecessary.

The subject of pension plans was held bargainable under the National Labor Relation Act in the case of *Inland Steel Co.* v. *N. L. R. B.*, 7th Cir., 170 F. 2d 247 (1948). This Court denied certiorari on the issue of bargainability of pensions (336 U. S. 960), although it did grant the writ on a separate constitutional question (339 U. S. 382, 386-387). Petitioner does not challenge the correctness of the *Inland* decision, but would make a distinction, as applied to the bargainability of pension plans, between the N. L. R. A. phrase "wages, hours and other terms and conditions of employment" (29 U. S. C. § 158(d)) and the Railway

Labor Act phrase "rates of pay, rules, or working conditions" (45 U. S. C. § 152). The variance in these two phrases was not considered sufficient, in the opinion of the Court of Appeals in this case, to justify a different holding as to bargainability (Petn. A-6).

The same result was reached by the Tenth Circuit in a case involving a contract provision for compulsory retirement. *McMullans* v. *Kansas, Oklahoma and Gulf Railway Co.*, 10th Cir., 229 F. 2d 50 (1956). It is clear that the decision in the instant case does not conflict with these other Court of Appeals decisions, and that it is completely consistent with this Court's views as expressed in *Telegraphers*.

Asserted Threat to Strike for Retired Persons.

Petitioner asserts that the "question of the right to strike for retired persons" is presented here (Petn. 2, 4), and petitioner devotes several pages of its argument to this subject (Petn. 12-19).

At the threshold of this problem lies an obstacle much too large to be put in a brief footnote, as petitioner has done (Petn. 17, footnote 8). This is the finding of the District Court on the point, which is as follows (App. 457):

> "During the collective bargaining conferences officers of the BRT, ORCB, and BLFE urged the plaintiff to restore or to increase benefits theretofore paid or being paid to employees of the plaintiff who had retired from the service of the plaintiff prior to the expiration of [an H-B on October 31, 1959, but such discussions were not treated by the officers of the defendant labor organizations as collective bargaining under the Railway Labor Act. Neither the Section 6 Notices served by the labor organizations nor the strike ballots taken by them referred to retired employees. Officers of the BRT, ORCB, and BLFE never at any time threatened to strike against the plaintiff on account of the position of such retired employees."

The Court of Appeals, referring to the above finding, stated in its opinion (Petn. A-6):

> "In the absence of a showing that such Findings of Fact were clearly erroneous (Rule 52(a), F. R. C. P.), this Court is bound by them and the issue of the lawfulness of a strike to obtain increased pension benefits for retired employees is, in fact, a moot question."

Respondents submit that the application for certiorari to review this question is governed by the "clearly erroneous rule." *Rudolph* v. *United States*, decided June 18, 1962, Advance Reports No. 5, 8 L. ed. 2d 484, at 486.

Asserted Attempt to Strike During Mediation.

Respondents cannot agree that any of the three questions put by petitioner (Petn. 2, Questions 3-5) regarding the National Mediation Board's role in this dispute are actually presented here. Each of these questions presupposes that the planned strike was set to take place during the Board's mediation processes under the Railway Labor Act. The District Court found otherwise (App. 457-460), and concluded that the parties had "exhausted all administrative remedies to prevent the threatened strike" (App. 461). It seems unnecessary to review here the detailed findings (App. 457-460) regarding the formal termination of mediation by the Board, or the subsequent resumption of bargaining by the parties with the aid of a mediator, or the evidence on which these findings are based, from all of which the District Court held that mediatory services under the Railway Labor Act had been terminated on March 16, 1961 and were not thereafter resumed. The Court of Appeals affirmed this holding (Petn. A-4, 5).

Respondents submit that these questions, on petition for certiorari, are also governed by the "clearly erroneous rule". *Rudolph* v. *United States*, decided June 18, 1962, Advance Reports No. 5, 8 L. ed. 2d 484, at 486.

Asserted Question Regarding Attorneys' Fees.

Petitioner states this question as follows (Petn. 2-3):

> "Whether, *when the injunction bond is not conditioned to provide for attorneys' fees*, defendants in a labor injunction suit are entitled to recover attorneys' fees under the bond or Section 7 of the Norris-LaGuardia Act?" (Italics added.)

Petitioner's argument (Petn. 23) quotes authority for the proposition that the bond should be the evidence and measure of petitioner's liability and respondent's protection.

Petitioner's difficulty here is that after focusing attention on what it apparently considers the decisive element in this question, namely, the *provisions of the bond*, it fails to make any reference to this document as appearing in the Joint Appendix or elsewhere in the record. Nor is any record reference made to any other evidence which would show what the conditions of the bond actually are. Respondents cannot find the bond in the Joint Appendix.

It follows that petitioner's statement, standing alone, that the bond "is not conditioned to provide for attorneys' fees" (Petn. 2-3) is essentially a legal opinion based on undisclosed facts.

Surely the question sought to be presented here is not so simple that the answer depends on whether or not the phrase "attorneys' fees" appears in the text of the document. If the terms of the bond do not contain such a phrase, or other words of similar import, automatic application of the rule of *damnum absque injuria* urged by petitioner (Petn. 23) is not necessarily the only conclusion which could be reached.

For example, inasmuch as one who applies for an injunction seeks equitable relief, other principles of equity might be applicable in this situation, including those relating to reformation of written obligations based on mutual mis-

take. It may be that the bond needs amending to speak the truth as to the intention of the Court which ordered it given. The District Judge, during the hearing of June 22, 1961, made it clear what was in his mind at the time the original temporary restraining order bond of $5,000 was set (App. 261):

> "The Court: There was a small bond at that time, because I looked at it as covering attorneys' fees. I believe it was $5,000."

Whether the railroad also intended that the original bond cover attorneys' fees is not as clear, but the record does show that the above quoted statement by the District Judge was made in the presence of petitioner's counsel, who made no comment (App. 255, 261). The same may also be said of the hearing of June 21, 1961, when the wording of the Final Decree was being determined, including the provisions of paragraph 2 of the decree, as follows (App. 464):

> "2. The plaintiff shall recompense, and pay to, the defendants herein their loss, expense, or damage caused to the defendants by the issuance of the Temporary Restraining Order herein on May 19, 1961 including all reasonable costs (together with reasonable attorneys' fees) and expense of defense against the order and against the granting of injunctive relief sought in this proceeding and subsequently denied by this Court. For the purpose of determining the amount thereof, this Court reserves jurisdiction of this cause for this purpose only. Hearing thereon will be set upon motion when time for appeal has passed. If appeal is taken hearing will be set after final mandate herein."

The transcript of that hearing shows (App. 244, 252) that counsel for petitioner made no comment on the above quoted portion of the decree. The Joint Appendix does not include any transcript of the initial hearing of May 19, 1961, during which the original bond was directed to be given.

The Court of Appeals found no error in the District Court's decree covering attorneys' fees (Petn. A-9). The opinion indicates that the Court of Appeals considered Section 7 of the Norris-LaGuardia Act (Petn. B-2 to B-4) as controlling. Petitioner contends that this holding is in conflict with *International Ladies' Garment Workers' Union* v. *Donnelly Garment Co.*, 8th Cir., 147 F. 2d 246, cert. denied, 325 U. S. 852 (1945). That case is not pertinent because the trial court there believed that Norris-LaGuardia was inapplicable, and did not intend to require a Norris-LaGuardia Act bond. The opinion states: "It is beyond question that the bonds in this case were not required by the court nor given by the plaintiff pursuant to the provisions of the Norris-LaGuardia Act" (147 F. 2d 246, at 253). Those circumstances obviously cannot be said to apply to the situation shown by the record here. No conflict has been shown.

With mixed feelings, we note finally that as to attorneys' fees, the petitioner makes no claim that the question is of any importance whatever.

CONCLUSION.

Respondents submit that the petition does not disclose any sufficient reason for granting certiorari, and that the writ should be denied.

Respectfully submitted,

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July 31, 1962.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 245

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY, A CORPORATION,

Petitioner,

vs.

BROTHERHOOD OF RAILROAD TRAINMEN, ET AL.,

Respondents.

BRIEF ON BEHALF OF RESPONDENTS BROTHERHOOD OF LOCOMOTIVE FIREMEN & ENGINEMEN, ET AL., AND ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, ET AL., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO 56

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QUESTIONS PRESENTED.

The respondents above named, hereinafter called "respondents," consider that petitioner's statement of the question presented is incorrect insofar as it attempts to raise a constitutional question, and is not sufficiently expressed in the terms and circumstances of this case as required by Rule 23-1(c) of this Court. Respondents submit that the question should be stated as follows:

Whether the Norris-LaGuardia Act withdraws jurisdiction from the District Court to enjoin a peaceful strike

by railroad employees in a "major dispute" over proposed changes in their collective bargaining agreements pending the carrier's appeal from a final decree on the merits which denied a permanent injunction and dismissed the suit, based on findings that no violations of the Railway Labor Act had been committed or threatened and conclusions that the proposed strike was lawful in all respects.

STATUTES AND RULES INVOLVED.

Petitioner fails to quote or cite under this heading, as required by this Court's Rule 23-1(d), F. R. C. P. Rules 65(e) and 82, which the Court of Appeals held (Petn. A-4) are involved in the interpretation of F. R. C. P. Rule 62(c), which is relied on by petitioner. These are, in pertinent part, as follows:

"Rule 65. Injunctions.

* * * * * * *

"(e) Employer and Employee; * * *

These rules do not modify any statute of the United States relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee; * * *"

"Rule 82. Jurisdiction and Venue Unaffected. These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein."

STATEMENT OF THE CASE.

Petitioner's statement of the case fails to show the basis for federal jurisdiction in the court of first instance, as required by Rule 23-1(g) of this Court.

The statement also says nothing of the nature of the underlying dispute or the basis of petitioner's claim to an anti-strike injunction. This omission, coupled with peti-

tioner's statement of the question presented, could create the erroneous impression that petitioner established its case for injunctive relief at the hearing on the merits in the trial court, and that, but for the Norris-LaGuardia Act, the carrier would have been granted a permanent injunction. A brief additional statement of the nature of the case is therefore necessary.

This action grows out of a dispute between the railroad and its employees concerning private non-contributory pension plans (App. 10). Two of such plans had been included in collectively bargained agreements previously made by the parties, the second of which was to expire October 31, 1959 (App. 10-11). On October 1, 1959 the unions served notice on the railroad under Section 6 of the Railway Labor Act, proposing that the expiring plan (Plan II-B) be continued in effect until a new plan (Plan II-CR) could be substituted (App. 10-11). Efforts during the following 18 months to settle the matter through negotiation and mediation failed, and a strike was set for May 20, 1961 (App. 11-16).

On May 19, 1961 the carrier sued to enjoin the proposed strike, charging that the unions had violated the Railway Labor Act (1) by threatening to strike for increased pension benefits to retired employees, (2) by failing to bargain in good faith, (3) by threatening to strike during mediation, and (4) by threatening to strike over pensions, an allegedly non-bargainable issue (App. 17-20).

After trial on the merits the District Court found against petitioner on each of these grounds (App. 457-461) and concluded that the proposed strike was lawful under the Railway Labor Act (App. 462).

The employees involved in this case have thus far established on the merits in two courts that the strike action they proposed to take on May 20, 1961 was lawful in all

respects. Nevertheless, they have been enjoined since May 19, 1961. The injunction by the District Court pending appeal, issued June 22, 1961, is still in effect because the Court of Appeals for the Seventh Circuit has stayed mandates on its judgments reversing the injunction pending appeal and affirming the District Court's decree on the merits.

REASONS FOR DENYING THE WRIT.

Respondents here state briefly their answers to petitioner's declared reasons for granting certiorari, following the order in which they appear in the petition, pages 5-6, and respondents thereafter state further reasons for denying the writ:

1. The issue sought to be raised is important, but not of such peak gravity and general importance that review is needed. It is no more important now than it was when presented in *Order of Railroad Telegraphers* v. *Chicago and North Western R. Co.*, 362 U. S. 330 (1960), in which case, although certiorari had been granted and the issue was squarely presented, this Court declined to decide it (362 U. S. 330, at 342). No constitutional question is involved here as petitioner apparently infers.

2. The decision sought to be reviewed is not shown to be in conflict with any decision by another court of appeals on the same matter. No decision on the exact question in another circuit has been cited, and the case in another circuit which is closest on its facts to this one is in accord: *Chicago, Rock Island and Pacific Railroad Company* v. *Switchmen's Union*, 2nd Cir., 292 F. 2d 61 (1961), certiorari denied June 25, 1962, Docket No. 237, Advance Reports No. 6, 8 L. ed. 2d 806.

3. The decision sought to be reviewed is not inconsistent with the same court's decision on an identical ques-

tion in *Chicago & Northwestern Ry. Co.* v. *Order of Railroad Telegraphers*, 264 F. 2d 254, at 255-256 (1959). That decision held that a permanent injunction should have been granted and did not decide the issue of an injunction pending appeal (Petn. A-3).

4. The decision sought to be reviewed is not in conflict with the principles of this Court's decision in *Brotherhood of Railroad Trainmen* v. *Chicago, River & Indiana Railroad Company*, 353 U. S. 30 (1957). That case involved a dispute referred to the National Railroad Adjustment Board, whereas this case admittedly involves a dispute concerning contract changes (Petn. A-16), in which this Court has held, as noted in the *River Road* decision, that Norris-LaGuardia is fully applicable (353 U. S. 42). *Brotherhood of R. Trainmen* v. *Toledo, P. & W. R. Co.*, 321 U. S. 50 (1944).

5. The decision sought to be reviewed is not wrong. It is correct in following the clear command of the Norris-LaGuardia Act as applied to anti-strike injunctive orders in a bargaining dispute under the Railway Labor Act. Both of these remedial Acts have contributed to the orderly discharge by the lower courts of their responsibilities.

6. The Norris-LaGuardia Act, rather than the decision sought to be reviewed, withdrew power from the District Court to issue an anti-strike injunction pending appeal. This Act *requires*, in labor cases, a departure from the "usual course of judicial proceedings" insofar as they may involve anti-strike injunctions.

7. The question presented is important, but the decision sought to be reviewed has provided a clearly correct answer under the plain provisions of the Norris-LaGuardia Act.

8. As noted above in paragraph 1, the question sought to be reviewed was previously before this Court in the

Telegraphers' case under substantially the same circumstances, and this Court considered it inadvisable to decide the question.

Respondents now briefly state further reasons for denying the writ:

9. This case in the Court of Appeals also involved the question whether, in view of the carrier's failure to establish *any* grounds for injunctive relief on the merits, it was not an abuse of discretion to grant the injunction pending appeal, irrespective of Norris-LaGuardia. Cf. *Virginian Railway Co. v. United States*, 272 U. S. 658, 672 (1926). Review on certiorari of the single issue sought to be presented by the petition would leave undecided this other potentially controlling question.

10. The granting of certiorari here would presumably require granting the writ on the contemporaneous petition to review denial of the permanent injunction on the merits; otherwise the issue sought to be presented here could become moot.

11. Petitioner has not fully complied with the provisions of Supreme Court Rule 23-1(c), (d) and (g), as noted above under "Questions Presented," "Statutes and Rules Involved" and "Statement of the Case."

12. Finally, recognizing that all pleas in certiorari matters are addressed to the Court's sound discretion in granting or denying the writ, respondents invite attention to the fact that although two courts have, after hearing the merits of the major labor dispute involved here, found respondents innocent of any committed or threatened wrongdoing, injunction orders against respondents have been in effect continuously since May 19, 1961.

ARGUMENT.

Importance of Question Presented.

The importance of questions raised in appealed cases naturally looms large in the minds of the litigants themselves, and this case is no exception. Respondents agree with petitioner that this is an important case, although they cannot subscribe to such astronomical terms as "first magnitude," which petitioner uses to describe it (Petn. 6, 7). The standards outlined in this Court's Rule 19 seem to require a more down-to-earth approach, and respondents will attempt to use that one.

At the outset the fact must be faced, in judging the importance of the question sought to be reviewed, that this precise issue was before the Court in 1960. *Order of Railroad Telegraphers* v. *Chicago and Northwestern R. Co.*, 362 U. S. 330. After granting certiorari, the Court decided the case on the merits of the question whether a permanent injunction should issue, and expressly declined to decide the "subsidiary" question of the injunction pending appeal (362 U. S. 330, at 342) (Petn. 7). Petitioner seems to feel that the Court's non-action in 1960 is in itself a ground for action now. We cannot agree, for several reasons. Petitioner also seeks by petition (Docket No. 246) filed contemporaneously with this one to review here the permanent injunction issue; therefore the question of an injunction pending appeal, although squarely presented in both cases, is as "subsidiary" here as it was in *Telegraphers*. Petitioner has pointed to nothing which makes this question any more important now than it was in 1960, or why, if it was inadvisable for the Court to decide the point after granting certiorari in *Telegraphers*, the writ should be granted here for that single purpose.

The *Telegraphers* case involved, as this one does, a carrier-employee "major dispute," *i.e.*, one involving a threatened strike over proposed changes in a collective bargaining agreement, as distinguished from a "minor dispute" involving interpretation or application of an existing agreement referable to the National Railroad Adjustment Board, such as that involved in *Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana R. Co.*, 353 U. S. 30 (1957).

The main question on the merits in *Telegraphers* was whether the underlying dispute (the union's request for a contract rule against proposed elimination of certain jobs) presented a bargainable issue. The majority held that this issue was bargainable under the Railway Labor Act. Four justices dissented on this point, but none expressed any doubt about the Court's holding that the Norris-LaGuardia Act prohibits issuance of a permanent injunction in a dispute which is subject to mandatory collective bargaining under the Railway Labor Act.

The Court explained its reason for granting certiorari in *Telegraphers* as follows (362 U. S. at 334-335):

> "On appeal the Court of Appeals did grant a permanent injunction upon its decision that 'The District Court's finding that the proposed contract change related to "rates of pay, rules, or working conditions," and was thus a bargainable issue under the Railway Labor Act, is clearly erroneous.' It held that the Norris-LaGuardia Act did not apply to bar an injunction against this strike and we granted certiorari, 361 U. S. 809, to consider this important question."

It thus seems evident that the question whether the dispute was subject to mandatory bargaining under the Railway Labor Act was the important question which prompted the granting of certiorari in *Telegraphers*, not the question of an injunction pending appeal. If this premise is correct,

then the Court's disposition of that case furnishes no support for petitioner's contention as to the importance of the question here sought to be reviewed.

Asserted Conflict With Other Circuits.

Petitioner asserts that the decision in question "is in conflict with the decisions of every other court of appeals and district court which has dealt with the question" (Petn. 5-6). Respondents have searched the petition without finding any reference to a supposedly conflicting decision by another court of appeals on the question of an anti-strike injunction pending appeal. No reference was found to a conflicting district court decision, except the trial court in which this suit originated (Petn. A-8).

The petition is curiously silent regarding the case from another circuit which most closely resembles this case on its facts. *Chicago, Rock Island and Pacific Railroad Company* v. *Switchmen's Union*, 2nd Cir., 292 F. 2d 61 (1961), certiorari denied June 25, 1962, Docket No. 237, Advance Reports No. 6, 8 L. ed. 2d 806. The opinion of the Court of Appeals in the instant case cites the *Rock Island* case as providing a guide for the decision on which review is here sought (Petn. A-4, A-5). In the *Rock Island* case, which involved a "major dispute" over wages, the district court had issued a temporary injunction against a strike pending hearing on the merits, based on findings that a "sufficient showing" had been made that the union had not acted in good faith and that "difficult and doubtful" questions were presented. 187 F. Supp. 581, at 584 (1960). The Court of Appeals for the Second Circuit held that such findings could not overcome the jurisdictional bar of Section 4 of the Norris-LaGuardia Act (29 U. S. C. § 104):

> "To overcome that bar plaintiffs had the burden of showing, as a matter of law, that the broad command of § 4 is subject to an exception when a Union has

> violated its duties under the Railway Labor Act and, as a matter of fact, that the defendant here had done that. They were obliged to meet that burden, not simply to show they might be able to meet it; until they met it, the court was without power to issue an injunction whether temporary or permanent."

In our case the Court of Appeals could find no material difference within the Norris-LaGuardia Act between an injunction pending hearing on the merits in the trial court and one pending hearing on the merits on appeal (Petn. A-5). Indeed, it would appear that so far as the objects and purposes of Norris-LaGuardia are concerned, a better apology could be made for an injunction entered after preliminary hearing has indicated to the trial judge that the strike may be unlawful than in a case, such as ours, in which the anti-strike injunction was issued after the trial court had decided on the merits that the proposed strike was lawful. In the former case, at least the court thought and acted in the same direction.

Respondents submit that these two cases indicate the Second and Seventh Circuits are in accord as to the effect of Norris-LaGuardia on anti-strike injunctions *pendente lite* in major disputes under the Railway Labor Act, and that there is no reason to suppose that there will be conflicts elsewhere. At present, there is no conflict to be resolved. Certiorari should not be granted on this ground.

Asserted Conflict With Chicago River Case.

Petitioner asserts (Petn. 6) that the decision sought to be reviewed is in conflict with the principle laid down by this Court in *Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana Railroad Company*, 353 U. S. 30 (1957).

Petitioner's reliance on the *Chicago River* case simply

reflects petitioner's insistence on ignoring the fact that the disputes there had gone to the National Railroad Adjustment Board, whereas the dispute involved here was not and could not be referred to the Adjustment Board for settlement. The underlying disputes in the *Chicago River* case were grievances arising under an *existing* bargaining agreement. The instant case involves a dispute over the terms of a new agreement. In *Chicago River* the disputes had been referred to the Adjustment Board and were pending before it at the time of the proposed strike. The Court traced the history of the establishment of the Board to handle disputes such as were there involved (353 U. S. at 34-40), and held that Norris-LaGuardia did not withdraw jurisdiction to issue an anti-strike injunction under such circumstances. The Court said (353 U. S. at 39):

> "The only question which remains is whether the federal courts can compel compliance with the provisions of the Act to the extent of enjoining a union from striking to defeat the jurisdiction of the Adjustment Board. * * *
>
> "We hold that the Norris-LaGuardia Act cannot be read alone in matters dealing with railway labor disputes. There must be an accommodation of that statute and the Railway Labor Act so that the obvious purpose in the enactment of each is preserved. We think that the purposes of these Acts are reconcilable."

More recently the Court has emphasized its intention to limit the rule of the *Chicago River* case to situations such as presented there under the Railway Labor Act. *Sinclair Refining Co.* v. *Atkinson*, decided June 18, 1962, Advance Reports No. 5, 8 L. ed. 2d 440, at 450.

Respondents submit that the decision in the instant case in no way conflicts with the principle laid down in the *Chicago River* case.

Petitioner's Reliance on Frankfurter and Greene, The Labor Injunction.

Petitioner cites (Petn. 14-15) Frankfurter and Greene, *The Labor Injunction* (1930), as supporting petitioner's view that the Norris-LaGuardia Act was not intended to affect anti-strike injunctions pending appeal. Respondents submit that such reliance is misplaced. These authors said (pages 224-225):

> "Another grave defect in the actual practice governing labor injunctions is dilatoriness in appeals. Our Table of Federal Cases shows the inordinate length of time that elapses between the first issuance of a decree and its consideration by an appellate tribunal. Time is of the essence in a strike. If modification or reversal of an injunction is to have any value, it must come before the energies of a strike have been spent."

The Table of Federal Cases referred to above (Id., Appendix II) indicates that in the majority of cases studied, the time between final injunction and decision on appeal was more than two years in the majority of cases in which appeals were taken.

Petitioner quotes (Petn. 15) these authors as having said (at page 80) "The tentative truth *rests* in making ultimate truth irrelevant." The correct quotation is: "The tentative truth *results* in making ultimate truth irrelevant." (Italics added.)

Frankfurter and Greene do not support petitioner's position.

Answer to Petitioner's Contention That the Norris-LaGuardia Act Does Not Affect "Inherent Judicial Power" to Enjoin Pending Appeal.

The authorities cited by petitioner (Petn. 9-13) which did *not* involve labor disputes or which were decided prior to the Norris-LaGuardia Act throw no light on the question of whether the writ should be granted. At most, they only demonstrate the need for this special legislation in labor cases.

The constitutional power of Congress to define and limit, in the manner provided in the Norris-LaGuardia Act, the jurisdiction of lower federal courts to issue injunctions in labor cases has long since been settled beyond any doubt. *Lauf v. E. G. Shinner and Co.*, 303 U. S. 323, 330 (1938). The constitutionality of the Norris-LaGuardia Act was not challenged below, and it is too late to inject any such question here.

If it be assumed that inferior federal courts once had, in labor cases, "inherent power" to issue injunctions pending appeal, it is nevertheless true that they held that power subject to the will of Congress to limit or withdraw it in labor cases. It is therefore useless to talk of the supposed necessity of "accommodating" the jurisdictional limitations of Norris-LaGuardia with the "inherent judicial power, granting jurisdiction" (Petn. 12-13).

Unless Section 4 and Section 7 of Norris-LaGuardia were meant to except anti-strike injunctions pending appeal from their limitations on jurisdiction, or unless these provisions have been repealed, such injunctions are prohibited. The opinion of the Court of Appeals in the instant case treats the question as one of interpretation, involving also F.R.C.P. Rules 62(c), 65(c) and 82 (Petn. A-3 to A-7). Petitioner insists that the Court was wrong. The opinion needs no defensive encomiums from respondents.

Since the question on petition for certiorari is whether the decision needs reviewing, not whether it needs reversing, respondents simply point out that the essence of petitioner's complaint against the decision on this point is that Norris-LaGuardia has been given "literal application" in this case (Petn. 16).

Asserted Conflict With Mine Workers' Case.

Petitioner contends (Petn. 17) that the opinion of the Court of Appeals has disregarded *United States* v. *United Mine Workers of America*, 330 U. S. 258 (1947), which petitioner asserts is extremely important here, inferring that the instant decision is in conflict. The employer in the *Mine Workers* case was the United States Government, to which the Court held the Norris-LaGuardia Act did not apply. That holding was the primary basis for the Court's decision that it was criminal contempt to defy a temporary restraining order which the district court had entered immediately after the suit was commenced.

The instant case does not raise any question about the temporary restraining order which was entered by the trial court at the inception of this case. In fact, the restraining order was continued in effect in this case by agreement of the parties pending trial on the merits (Petn. 3), and the order was, of course, obeyed. It is true that the opinion in *Mine Workers* also stated the alternative ground that a restraining order entered to determine the question of jurisdiction, even if jurisdiction were later found lacking, must be obeyed under penalty of contempt. But obviously, since the instant case did not involve any dispute over a temporary restraining order, that language has no bearing on the facts presented here, and no conflict has been shown. Cf. *Re Green*, decided May 21, 1962, Advance Reports No. 3, 8 L. ed. 198, at 201, 203.

Answer to Petitioner's Contentions Concerning Consequences of Withholding Injunctive Relief After Railroad Has Lost on the Merits.

In context pitched in such ominous tones as to make one fear that the very fabric of our society may be torn asunder unless the situation is remedied, petitioner makes this statement regarding the effect of the decision in the instant case (Petn. 19):

> "A decision on the merits against the plaintiff-carrier in a Railway Labor Act injunction case will immediately free the defendant-labor organization to strike to achieve its demands."

We agree that the decision does have this effect: when the decision on the merits is that a proposed strike is lawful, the court's deeds will follow its words and the court will not condemn what it has just approved. The right of railroad employees to strike has many prerequisites, but they do not include prior establishment of an unbroken line of court decisions approving their particular proposed strike, ending with the denial of the carrier's last petition for rehearing in the court of last resort.

Concerning the effect of this, let us consider what could have happened in this case if the anti-strike injunction pending appeal had been refused. The carrier could have appealed immediately from such refusal, and would have been entitled to expeditious and preferential hearing as provided in Section 10 of the Norris-LaGuardia Act in cases involving issuance or *denial* of "any temporary injunction" in a labor dispute (29 U. S. C. § 110). Meanwhile, the employees would be free to set a new strike date if they chose, and the carrier could then take such measures as it felt were necessary or proper to avoid a work stoppage, including the obvious one of putting pension Plan II-CR into effect for some period. The additional cost involved would

have been about 3¢ per hour (App. 185, 271-272). During the pendency of the appeal, or appeals, the parties could and should bargain in good faith toward a negotiated permanent settlement of the underlying dispute, and if one were reached that would, of course, put an end to the litigation. If the carrier won its appeal or appeals, it could then take such action as seemed to it appropriate. These alternatives do not appear necessarily ruinous, either to public or private interests.

Respondents do not expect petitioner to agree that the above procedures are preferable, from its point of view, to an anti-strike injunction which issues regardless of the outcome of the trial on the merits and puts all economic pressures on the side of the carrier in resolving the dispute. But remedial federal statutes such as the Norris-LaGuardia Act, the Railway Labor Act and the Wagner Act have changed that, and our present national labor relations policy in this respect is now as stated in *N. L. R. B.* v. *Insurance Agents' International*, 361 U. S. 477 (1960), at 489:

> "Abstract logical analysis might find inconsistency between the command of the statute to negotiate toward an agreement in good faith and the legitimacy of the use of economic weapons, frequently having the *most serious effect upon individual workers and productive enterprises*, to induce one party to come to the terms desired by the other. But the truth of the matter is that at the present statutory stage of our national labor relations policy, the two factors—necessity for good-faith bargaining between parties, and the availability of economic pressure devices to each to make the other party incline to agree on one's terms—exist side by side."

Under this policy, it is indeed true that a "decision on the merits against the plaintiff-carrier in a Railway Labor Act injunction case will immediately free the defendant-labor organization to strike to achieve its demands" (Petn.

19). The employer cannot expect to see a court's "inherent power" to issue an anti-strike injunction pending appeal rise like some mighty phoenix from the ashes of the employer's case on the merits, turning defeat into victory for the employer, and victory into defeat for the employees. Justice now talks and walks in the same direction.

CONCLUSION.

Respondents submit that the petition does not disclose sufficient reasons for granting a writ of certiorari, and that it should be denied.

Respectfully submitted,

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July 30, 1962.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 245

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY, A Corporation,

Petitioner,

vs.

BROTHERHOOD OF RAILROAD TRAINMEN, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR BROTHERHOOD OF RAILROAD TRAINMEN IN OPPOSITION

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Respondents, Brotherhood of Railroad Trainmen, and W. E. Grady, T. R. McDermott, W. H. Starner and R. E. Dockendorf individually and as officers of the said Brotherhood of Railroad Trainmen and as representatives of the employees of Petitioner represented by the Brotherhood

of Railroad Trainmen (hereinafter designated as BRT) for Answer to the Petition for Writ of Certiorari say:

OPINIONS BELOW.

The opinion of the District Court is reported at 196 F. Supp. 158. The opinion of the Court of Appeals is reported at 302 F. 2d 545 (Appendix A to the Petition).

JURISDICTION.

The jurisdictional requisites are adequately stated in the Petition.

QUESTION PRESENTED.

Whether the Norris-LaGuardia Act prohibits a District Court from entering an injunction restraining a threatened strike pending appeal after a hearing on the merits has resulted in a determination that the District Court is without jurisdiction because a "labor dispute" exists.

STATUTES AND RULES INVOLVED.

Some of the pertinent provisions of the Norris-LaGuardia Act (47 Stat. 70, 29 U. S. C. 101 et seq.) are set forth in the Petition as Appendix B. Section 2 of that Act is pertinent and provides:

> "In the interpretation of this chapter and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are defined and limited in this chapter, the public policy of the United States is declared as follows:

> Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are enacted."

In addition, Section 10 of that Act is also pertinent and provides:

> "Whenever any court of the United States shall issue or deny any temporary injunction in a case involving or growing out of a labor dispute, the court shall, upon the request of any party to the proceedings and on his filing the usual bond for costs, forthwith certify as in ordinary cases the record of the case to the court of appeals for its review. Upon the filing of such record in the court of appeals, the appeals shall be heard and the temporary injunctive order affirmed, modified, or set aside with the greatest possible expedition, giving the proceedings precedence over all other matters except older matters of the same character."

Rule 62(c), Fed. Rules of Civil Procedure is set out in the Petition (p. 3). Especially pertinent thereto are Rule 65(c) which in pertinent part provides:

> "These rules do not modify any statute of the United States relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee. . ."

and Rule 82, F. R. C. P., which provides:

> "These rules shall not be construed to extend or limit the jurisdiction of the United States District Courts. . ."

STATEMENT.

This litigation concerns the efforts of the Petitioner to obtain an injunction pending an appeal in a "labor dispute" despite the fact that Petitioner lost on all issues after a full hearing on the merits. The ruling on the merits is the subject of a separate Petition for Writ of Certiorari. The instant Petition concerns the ruling of the United States Court of Appeals for the Seventh Circuit reversing the District Court judgment enjoining BRT and other respondents from striking pending the Petitioner's Appeal from the judgment on the merits.

The Petition adequately summarizes the District Court judgment. The reversal of that judgment by the Court of Appeals was based on the sole issue involved in this Petition: whether a District Court can issue an injunction pending appeal after concluding as a matter of law and after a hearing on the merits that the Norris-LaGuardia Act had divested it of jurisdiction to take any action restraining BRT and the other union defendants. The Court of Appeals answered this sole issue in the negative.

ARGUMENT.

This case involves an attempt by a railroad to obtain a temporary injunction after losing on the merits following a full hearing. On the merits, the District Court found, among other findings adverse to Petitioner, that it was divested of jurisdiction because a "labor dispute" existed within the meaning of the Norris-LaGuardia Act 47 Stat. 70, 29 U. S. C. § 101 *et seq.* Nonetheless, the District Court entered an injunction pending appeal finding ". . . the equities of the general public greater than those of the defendants." (App. 468). The Court of Appeals correctly reversed that judgment.

No question of importance is raised when the Norris-LaGuardia Act is interpreted so as to take the Courts out of the "labor injunction business" and especially when the Petitioner has been accorded an improvidently issued Temporary Restraining Order and a full hearing on the merits. No conflict is presented with other decisions of this Court or of Courts of Appeal. There is no important question of federal law when a Court of Appeals refuses to assert the divine right of government by the judiciary contrary to the plain meaning of the Norris-LaGuardia Act.

I.

THE DECISION BELOW IS CLEARLY CORRECT.

The Court of Appeals carefully considered the briefs and arguments of the parties and its learned opinion discusses all of the pertinent cases, statutes, and rules. Petitioner begs the question when it asserts that the Norris-LaGuardia Act does not specifically state that it bars an injunction pending appeal. The intent of Congress was clearly to

take all the federal courts out of the labor injunction business. *Marine Cooks & Stewards* v. *Panama S. S. Co.*, 362 U. S. 365, 369. No amount of tortured reasoning can obscure the correctness of the calm, dispassionate opinion below which recognizes the broad prohibition of labor injunctions which Congress carefully decreed and expressed throughout the Norris-LaGuardia Act. The Court of Appeals properly and explicitly rejected Petitioner's theory below that the injunction was warranted by Rule 62(c), Federal Rules of Civil Procedure. The analysis contained in the Opinion below is convincing because it is clearly correct.

II.

THERE IS NO CONFLICT OF DECISION.

Petitioner claims a conflict of decision based on an unessential citation in the Opinion. Moreover, the supposed conflict has to be tortured out of an accommodation of two major labor statutes passed contemporaneously as parts of a Congressional statement of labor policy. That case is no authority for asserting a compelled deference to the Federal Courts contrary to the Norris-LaGuardia Act. 47 Stat. 70, 29 U. S. C. 101 *et seq.*

III.

THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW TO BE DECIDED.

The decision below holds only that a railroad which cannot prove that the Norris-LaGuardia Act does not apply cannot obtain an injunction by appealing the trial court determination of lack of jurisdiction. Having lost in the trial

court, it must bear the consequences of that loss. This has always been the case when the union loses; it must bear the consequences of that loss. This is in accord with the intent of Congress which did not pass an act which would permit employers to exhaust unions by means of appellate procedures. No disorder is caused by such perfect equity and Congress, of course, intended a serious encroachment on the traditional exercise of federal judicial power (See Petition, p. 7). On the contrary, the position advocated in the Petition would stultify collective bargaining and require that all avenues of the law be exhausted before serious bargaining could begin.

There is no question of a supervision of the lower federal courts. This Court has clearly set out the general principles of Norris-LaGuardia and of the Railway Labor Act of 1926, 44 Stat. 577, 45 U. S. C. § 151 *et seq.*

No serious doubt exists as to the meaning of either Act. There is, therefore, no important question of federal law to be decided.

CONCLUSION.

Because of the applicable law and the demands of substantial justice, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Railroad Trainmen (hereinafter designated as BRT) for Answer to the Petition for Writ of Certiorari say:

OPINIONS BELOW.

The opinion of the District Court is reported at 196 F. Supp. 158. The opinion of the Court of Appeals is reported at 302 F. 2d 541 (Appendix A to the Petition).

JURISDICTION.

The jurisdictional requisites are adequately stated in the Petition.

QUESTIONS PRESENTED.

1. Whether the Norris-LaGuardia Act prohibits the issuance of an injunction in a major dispute under the Railway Labor Act.

2. Whether the National Mediation Board has the power to impose a supermediation over the objection of the unions after that Board has previously mediated the same dispute and has notified the parties that it is terminating its services.

3. Whether Pension Plans are bargainable under the Railway Labor Act.

4. Whether Petitioner may raise a question of law as to bargaining for retired persons and as to the awarding of attorneys' fees to the respondents when the District Court found no such bargaining and further found that respondents were entitled to attorneys' fees by virtue of Section 7 of the Norris-LaGuardia Act.

STATUTES INVOLVED.

The pertinent statutes are adequately set forth in the Petition at page 3.

STATEMENT.

This case involves the request of BRT and the other union respondents for an improvement of an existing pension plan. Preceding the instant dispute, there were two previous plans in effect between the parties. The first of these plans expired on October 31, 1957 (App. 350-358, Finding of Fact No. 10, App. 453, 454). The second, commonly known as Plan H-B, was to expire on October 31, 1959 (App. 359-378, Finding of Fact No. 10, App. 453-454). On October 1, 1959, defendants sought changes in the pension plan by requesting such changes in a notice served in accordance with the provisions of Section 6 of the Railway Labor Act (App. 455).

When the Section 6 Notice was first discussed between the parties, defendants requested an extension of Plan H-B for a period of 30, 60, or 90 days. This was done because the various plans were adaptations for railroads of pension plans obtained by the United Steelworkers (App. 125, Finding of Fact No. 10, App. 454) and the Steelworkers at that time had not signed a new pension plan (App. 129). At those conferences, the defendants' request for extensions of the old plan was refused (App. 212).

The National Mediation Board took jurisdiction of the dispute on August 22, 1960. At the mediation conferences, copies of the latest non-contributory pension plans, Plan H-CR, were obtained by defendants and presented to Mr. Verd who refused to accept or to discuss them (Finding of Fact No. 12, App. 456). The Court found that Verd was of the opinion that he was not required to bargain, under the Railway Labor Act, about the defendants' proposed Pension Plan but that he did in fact bargain about the said Plan (App. 45).

In March 1961, the National Mediation Board terminated its services after defendants had declined to arbitrate the dispute between the parties (App. 300, 301).

Conferences were had in April without agreement. At the meeting of April 19, 1961, Mr. Verd offered to grant Plan H-CR if the defendants would agree that a cent and a half an hour or a flat $3 a month could be deducted from the wages of each man who worked. The defendants rejected this offer because of a belief that the E. J. & E. employees were being discriminated against since 5 other U. S. Steel railroads had obtained Plan H-CR without any cost to the employees (App. 100, 101).

A strike was authorized by the defendants for May 20, 1961 at 6:00 A. M. (App. 148). The National Mediation Board, on May 16, requested the defendants to defer the strike until further conferences were held (App. 14). The Mediation Board was advised that it was not necessary to defer the strike date. Mediator Rupp was told that some communication was desired as to whether the case was in mediation. That communication was then received and stated that the Board was not asserting jurisdiction under Sections 5 or 6 of the Railway Labor Act (App. 105, Finding of Fact No. 18, App. 458-460).

The Complaint and Answers were then filed and a hearing on the merits was had resulting in the Decree from which the railroad appealed. The Court of Appeals affirmed the decree (Appendix A to Petition).

ARGUMENT

This case involves the request of BRT and the other unions for a pension plan (commonly called H-CR) which provided more benefits than the pension plan (commonly called H-B) in existence by virtue of an agreement between the parties. This request for change clearly created a "major dispute" under the Railway Labor Act. The District Court's refusal of injunctive relief was clearly correct since such relief was prohibited by the provisions of the Norris-LaGuardia Act, 47 Stat. 70, 29 U. S. C. § 101 *et seq.* The Court of Appeals correctly refused to put the federal courts back into the labor injunction business. No supermediation by the National Mediation Board is, or could be, involved in this case. Pension Plans are bargainable items under the Railway Labor Act. This Court will not review questions which turn on whether or not the District Court's findings of fact are clearly erroneous. There are no important questions of federal law involved in this case.

I

THE NORRIS-LA GUARDIA ACT PROHIBITS THE GRANTING OF AN INJUNCTION IN A MAJOR DISPUTE UNDER THE RAILWAY LABOR ACT.

This case, involving a request for an improved pension plan, is clearly a major dispute as opposed to a minor dispute within the meaning of those terms as used under the Railway Labor Act. The Norris-LaGuardia Act applies to all Railway Labor Act major disputes. *Brotherhood of R. T.* v. *Toledo, P. & W. R. Co.*, 321 U. S. 50. The requested change is specifically within the language of Section 13 (*c*)

of the Norris-LaGuardia Act 29 U. S. C. 113(c) defining a labor dispute as any controversy "concerning terms or conditions of employment".

Petitioner does not contend otherwise, stating only that the demands of the employees are not bargainable items under the Railway Labor Act. This Court has never held that a request for a change in an agreement could be enjoined because the demand was "non-bargainable". As this Court stated in *Telegraphers* v. *C. & N. W. R. Co.*, 362 U. S. 330, 338, the trend has been to broaden, not narrow, the scope of subjects about which workers or railroads may or must negotiate and bargain collectively.

Petitioner has cited no applicable cases and has ignored the Norris-LaGuardia Act. That Act is paramount in a major dispute. As this Court stated in *Marine Cooks & Stewards* v. *Panama S. S. Co.*, 362 U. S. 365, 369:

> "That Act's language is broad. The language is broad because Congress was intent upon taking the federal courts out of the labor injunction business. . . ."

The demand for a change being squarely within the wording of the Norris-LaGuardia Act, the Court of Appeals correctly affirmed the judgment below denying injunctive relief.

II.

THE NATIONAL MEDIATION BOARD DID NOT, AND COULD NOT, LEGALLY IMPOSE SUPERMEDIATION ON THE RESPONDENT UNIONS.

Petitioner's contention at this point is completely contrary to the record. It is clear, from that record that the National Mediation Board was not asserting any jurisdiction to impose a second mediation on the parties over the objections of the respondent unions. The Board so stated in its telegram of May 18 (App. 15, 16).

Petitioner's argument that the Mediation Board had the power to impose a second mediation without their consent is equally without merit. Such supermediation is contrary to the language of Section 5 First of the Railway Labor Act which states alternative methods by which mediation can be achieved, the first within the control of the parties or a party; the second within the control of the Board on its own initiative. In either event, the Board mediates and then proffers arbitration if unsuccessful. This procedure was exhausted. Petitioner's contention that the Mediation Board had the power to begin this procedure again would completely eliminate the necessity for the further power of the Mediation Board to recommend to the President of the United States that a Presidential Emergency Board should be appointed. The National Mediation Board itself denied it had such power in its *brief amicus* filed in *Telegraphers v. C. & N. W. R. Co.*, 362 U. S. 330, 338.

Petitioner's point is without merit.

III.

PENSION PLANS ARE BARGAINABLE ITEMS UNDER THE RAILWAY LABOR ACT.

Despite the fact that petitioner had previously bargained for two pension plans with the respondent unions, it continues to contend such plans are not bargainable items under the Railway Labor Act. No Railway Labor Act case is cited for this proposition. As this Court stated in *Telegraphers v. C. & N. W. R. Co.*, 362 U. S. 330, 338:

> "In an effort to prevent a disruption and stoppage of interstate commerce, the trend of legislation affecting railroads and railroad employees has been to broaden, not narrow, the scope of subjects about which workers and railroads may or must negotiate and bar-

> gain collectively. Furthermore, the whole idea of what is bargainable has been greatly affected by the practices and customs of the railroads and their employees themselves. It is too late now to argue that employees can have no collective voice to influence railroads to act in a way that will preserve the interests of the employees as well as the interests of the railroad and the public at large."

This Supreme Court statement is squarely in point here since 24 of the 27 Class I, line haul railroads in the United States, employing 80% of all railroad employees, had pension plans which were supplementary to Railroad Retirement Act Benefits (App. 127, 128, Defendants' Exhibit 5). In addition, all of the other United States Steel railroads, with the exception of the petitioner and the D. M. & I. R., had pension plans in effect which were similar to II-CR requested by the defendants herein (App. 133-136). It is thus seen that there is a custom and practice to have such plans throughout the railroad industry, and a custom and practice to bargain for such plans on the railroads owned by steel companies.

Petitioner points out past history of unilateral institutions of pension plans in the railroad industry (P. B. 24) but ignores the fact that it negotiated two such previous agreements. Petitioner also ignores the fact that the last such pension agreement froze the "rates of pay" of the BRT insofar as the cost of any program of pension benefits were concerned (App. 378).

In such circumstances, petitioner has failed to point out any specific section of the Railway Labor Act which made unlawful the demands for an improved pension plan. *Telegraphers* v. *C. & N. W. R. Co.*, 362 U. S. 330, 338, 339. Petitioner had the burden of proof and was required to establish that the demands were unlawful. *Chicago, Rock*

Island v. Switchmen's Union, 2nd Cir., 292 F. 2d 61, 71. Since petitioner failed to do so, the Court of Appeals correctly held that the defendants did not violate any of the provisions of the Railway Labor Act.

IV.

NO QUESTION IS PRESENTED FOR THIS COURT ON ISSUES INVOLVING FINDINGS OF FACT WHICH THE COURT OF APPEALS REFUSED TO FIND CLEARLY ERRONEOUS.

Petitioner seeks to raise a question as to a supposed bargaining for retired persons. Petitioner also seeks to raise a question as to the awarding of attorneys' fees based on the wording of a bond which is nowhere to be found in the record. As to both of these items, the Court of Appeals decreed that the rulings of the trial court and its findings were not clearly erroneous.

No question is presented for the Court in such circumstances and it is obvious that there is no important question of federal law to be decided by this Court.

CONCLUSION.

Because of the applicable law and the demands of substantial justice, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 245

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY, A CORPORATION,

Petitioner,

vs.

BROTHERHOOD OF RAILROAD TRAINMEN, et al.,

Respondents.

REPLY OF ELGIN, JOLIET AND EASTERN RAILWAY COMPANY TO BRIEFS IN OPPOSITION TO ITS PETITION FOR A WRIT OF CERTIORARI.

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THE BLAKELY PRINTING COMPANY, CHICAGO

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ELGIN, JOLIET AND EASTERN RAILWAY COMPANY, A CORPORATION,

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Respondents.

REPLY OF ELGIN, JOLIET AND EASTERN RAILWAY COMPANY TO BRIEFS IN OPPOSITION TO ITS PETITION FOR A WRIT OF CERTIORARI.

This Reply will bring to the Court's attention two recent developments which demonstrate the need for granting the Writ.

I.

During the period August 8 to August 15, 1962, legal proceedings transpired in Chicago which should lay to rest any suggestions that the question presented is not important, or does not require clarification, or is not subject to conflicting treatment by the courts. In fact, the most glaring conflict exists within the one circuit, the Seventh, from which this Petition has been taken.

On August 8, 1962, District Judge Perry of the Northern District of Illinois entered a final order in *Locomotive Engineers* v. *Baltimore & Ohio Railroad*, 45 CCH Labor Cases, para. 17,777, dismissing the amended complaint filed by five railway labor organizations, including the three respondent organizations in the case at bar. The amended complaint sought a declaratory judgment and injunction against 193 railroad companies involved in a Railway Labor Act major dispute with the 200,000 or more employees represented by the five organizations. The dispute concerned the railroads' attempts, after the statutory 30-day cooling-off period following the termination of negotiations and federal mediation, to place into effect certain important revisions in railroad work rules. Following the dismissal of the amended complaint on August 8, 1962, the plaintiff organizations immediately filed a notice of appeal and a motion requesting the District Judge to grant an injunction pending the organizations' appeal.

On August 10, 1962, after hearing testimony and argument, Judge Perry (who had granted the injunction pending appeal in the instant case to the plaintiff Elgin, Joliet and Eastern Railway Company after dismissing its complaint, and who was reversed by the Court of Appeals for the Seventh Circuit in the decision petitioner urges this Court to review by Certiorari) granted the plaintiffs' motion and issued an injunction pending appeal. 45 CCH Labor Cases, para. 17,778. A copy of Judge Perry's findings, conclusions and order is attached hereto as Appendix A.

A notice of appeal from Judge Perry's injunction pending appeal was immediately filed by the railroads. Then, on August 13, 1962, the appellant railroads filed a motion in the Court of Appeals for the Seventh Circuit to vacate the injunction, and the next day the appellee labor organizations filed an answer. On August 15, 1962, oral argu-

ment on the motion was heard before Circuit Judges Schnackenberg, Castle and Kiley, and on the same day the Court denied the motion to vacate the injunction pending appeal. A copy of the Court of Appeals order leaving in effect the injunction pending appeal is attached hereto as Appendix B.

This was the same Court which, less than four months before, reversed the same District Judge's issuance of the injunction pending appeal involved in the instant case, and which denied, only two months before, the Elgin, Joliet and Eastern Railway Company's petition for rehearing of that reversal. As things now stand, the status of the injunction pending appeal from the dismissal of a complaint in a Railway Labor Act injunction case is, to say the least, confused.

The significance of the question, and the evident public interest in preserving the *status quo* pending appeal, have been shown plainly in the *B. & O.* litigation, by the five railroad labor organizations' successful injunctive action to protect their many thousands of members from important work rules revisions sought to be initiated before the legality of the revisions had been resolved on appeal.

II.

Since the filing of the Petition in this case another Circuit has treated the injunction pending appeal question inconsistently with the ruling of the Court of Appeals below. In *Texas & New Orleans Railroad* v. *Trainmen*, 45 CCH Labor Cases, para. 17,716 (July 6, 1962, reported July 19, 1962), the Court of Appeals for the Fifth Circuit, in a Railway Labor Act injunction case, affirmed the District Court which had "concluded that the Norris-LaGuardia Act precluded injunctive relief and on July 24 [1961] denied the request for a preliminary injunction." 45 CCH

Labor Cases at page 27,126. See 197 F. Supp. 348 (S. D. Tex. 1961) for the District Court's opinion. The Court of Appeals expressly recognized (45 CCH Labor Cases at page 27,126) that "on the same day [July 24, 1961], however, the [district] court entered an injunction pending appeal."

The Fifth Circuit did not question the District Court's action in issuing the injunction pending appeal. In tacitly approving the granting of the injunction pending appeal, the Fifth Circuit joins the growing number of courts, exclusive of the Seventh Circuit in the instant case, which have either granted such injunctions or approved them.

In this connection the BLFE-ORCB Brief in Opposition (at page 9) makes a statement which should be corrected. That Brief asserts: "Respondents have searched the petition without finding any reference to a supposedly conflicting decision by another court of appeals on the question of an anti-strike injunction pending appeal. No reference was found to a conflicting district court decision except the trial court in which this suit originated."

The attention of the Court and of the BLFE-ORCB is respectfully directed to page 13 of the Petition, which reads in part:

> "The court's holding overruled *sub silentio* a long line of lower federal court labor injunction cases decided since the enactment of the [Norris-LaGuardia] Act.[3] In these cases injunctions pending appeal were uniformerly granted even though the Norris-LaGuardia Act had been held or had arguably applied to oust jurisdiction in the main case. The approach of these courts in this situation is wholly consistent with a proper analysis of the statute."

Footnote 3 of the Petition, referred to in this quotation, collects the cases and is here reprinted for convenience:

> "3. *Chicago River & Indiana R. Co. v. Brotherhood of Railroad Trainmen*, 229 F. 2d 926 (7th Cir. 1956), aff'd 353 U. S. 30 (1957); *Norfolk & Portsmouth Belt Line R. Co. v. Brotherhood of Railroad Trainmen*, 248 F. 2d 34 (4th Cir. 1957), cert. den. 355 U. S. 914 (1958); *Int'l Ladies' Garment Workers' Union v. Donnelly Garment Co.*, 147 F. 2d 246 (8th Cir. 1945), cert. den. 325 U. S. 852 (1945); *Chicago & Northwestern Ry. Co. v. Order of Railroad Telegraphers*, 36 CCH Labor Cases, para. 65,103 (N. D. Ill. 1958), motion to dismiss Federal Rule 62(c) injunction denied, 36 CCH Labor Cases, para. 65,283 (7th Cir. 1959)."

CONCLUSION.

In view of developments since the filing of the Petition in this case, the need for review by this Court seems increased. The Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

IN THE
UNITED STATES DISTRICT COURT
For the
Northern District of Illinois
Eastern Division.

Brotherhood of Locomotive Engineers, et al.,
Plaintiffs,
vs.
The Baltimore & Ohio Railroad Company, et al.,
Defendants.
No. 62 C 1451.

PERRY, D. J.: This matter came on for hearing on plaintiffs' motion for an injunction pending appeal, the plaintiffs have duly filed a Notice of Appeal and Appeal Bond, the plaintiffs and defendants have been fully heard on plaintiffs' motion for injunction pending appeal, and the Court is fully advised in the premises.

Findings of Fact.

I. This action involves a claimed violation of the Railway Labor Act by the defendants and the class of railroads they represent by their threat to put into effect on August 16, 1962 a "Promulgation of Revisions in Work Rules" dated July 17, 1962, and their threat to put into effect on August 16, 1962 a substituted "Promulgation of Revisions in Work Rules" dated August 6, 1962.

II. The railroads that are parties to said Promulgations

number approximately 200, and are too numerous to be brought into Court. The character of the rights plaintiffs assert against said railroads are several, there are common questions of law and fact affecting the said rights, and common relief is sought against said railroads. The named defendants fairly insure the adequate representation of all members of the class.

III. The contents of the Promulgation of August 6, 1962, if put into effect, would drastically change the rates of pay, rules, and working conditions of some 200,000 employees of the railroads represented in collective bargaining by the plaintiffs.

IV. The Promulgation announces, with respect to some of the drastic changes, that all agreements, rules, regulations, interpretations, and practices, however established and theretofore in effect, are eliminated and cancelled to the extent that they conflict in any respect with said Promulgation.

V. For many years the plaintiffs have had collective bargaining agreements with the defendant carriers and the carriers represented by the defendants, containing numerous, detailed, and substantially interrelated rules concerning the assignment of firemen, helpers, trainmen, and other train-and-engine-service employees of the railroads, the requirement of assignment of such employees to such service, the minimum number of employees in each of such classification of such employees to be assigned to a train or engine and the establishment of terminals, seniority district, and divisions. Many thousands of railroad employees represented by the plaintiffs have built up substantial seniority for particular assignments and have established homes and community ties based upon such assignments. If the Promulgation of August 6, 1962 is placed in effect, said employees would be subject to having the origin or termination of their runs or their place of work

changed unilaterally by the railroads and changed from time to time.

VI. For many years it has been the practice to make changes in rates of pay, rules, or working conditions specifying existing rules or conditions that were changed thereby.

VII. If, as claimed, the terms of the Promulgation of August 6, 1962 would be installed unlawfully, the damage to the plaintiffs and the employees they represent would be impossible to calculate and would be irreparable. Some of the injury to plaintiffs and the employees represented by them cannot be calculated in money.

VIII. The rights claimed by the plaintiffs for the employees they represent do not merely concern rates of pay, job assignments and other rules, and working conditions, but involve also the discharge of thousands of employees from positions long held by them, and the dislocation of many others, and their families, from their homes and communities.

IX. The rates of pay, rules, and working conditions which the Promulgation of August 6, 1962 would abrogate or modify have been agreed to by the plaintiffs and the railroads on a continuing basis through collective bargaining. The granting of an injunction pending appeal will temporarily continue in effect such rates of pay, rules, and working conditions agreed to until the Court of Appeals can review the legality of the threat to put into effect the terms of said Promulgation.

X. The Court finds that its judgment and decree denying the preliminary injunction and dismissing the complaint for failure to state a claim upon which relief can be granted include legal questions of first impression in the Courts of the United States, and no settled rules of law have heretofore been laid down concerning those issues.

XI. The Court has inquired into and considered the equities of the parties herein and has further considered the equities of the general public as they would be affected by this matter. The Court has balanced the equities and found the equities of the plaintiffs and the general public greater than those of the defendants herein.

Conclusions of Law.

1. Findings of Fact II, VII, IX, X, and XI are repeated as Conclusions of Law.

2. If the Court of Appeals determines that putting into effect the Promulgation of August 6, 1962 would be unlawful, the plaintiffs and the employees represented by them and their families will have no adequate remedy at law for such terms having been unilaterally imposed by the railroad.

3. The threatened action to put into effect the terms of said Promulgation, if illegal, will frustrate the purposes and operation of the Railway Labor Act, and will deprive the plaintiffs and those they represent of their rights under the Railway Labor Act.

4. The equities in favor of maintaining the status quo during the pendency of plaintiffs' appeal substantially outweigh the equities against maintaining the status quo.

5. The jurisdiction of this Court to grant an injunction during the pendency of this appeal exists under the provisions of Rule 62(c) of the Federal Rules of Civil Procedure and the Judicial Code and the inherent powers of the Court.

6. The provisions of the Norris-La Guardia Act (29 U. S. C. § 101 et seq.) do not apply in this case so as to deprive this Court of jurisdiction to grant an injunction restraining the defendant from putting their promulgation in effect during the pendency of the appeal under the provisions of Rule 62(c).

Order Under 62(c) F. R. C. P.

This matter having come on for hearing upon plaintiffs' motion for an injunction pending appeal, and the plaintiffs having duly filed a Notice of Appeal and Appeal Bond, and the plaintiffs and defendants having been fully heard on plaintiffs' motion for injunction pending appeal, and the Court being fully advised in the premises;

IT IS HEREBY ORDERED, under Rule 62(c) of the Federal Rules of Civil Procedure, that the defendants, their officers, agents, employees, attorneys, and all others acting in concert or in participation with them be, and they hereby are, enjoined and restrained from putting into effect the "Promulgation of Revision in Work Rules", a copy of which is attached to the amendment to the complaint as Appendix B; during the pendency of plaintiffs' appeal.

Enter:

J. S. PERRY,
Judge.

Date: August 10, 1962.

APPENDIX B.

IN THE

UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

Brotherhood of Locomotive Engineers, et al., *Plaintiffs-Appellees,* *vs.* The Baltimore & Ohio Railroad Company, et al., *Defendants-Appellants.*	No. 13855.

Before:

Hon. Elmer J. Schnackenberg, Circuit Judge,
Hon. Latham Castle, Circuit Judge,
Hon. Roger J. Kiley, Circuit Judge.

This matter comes before the Court on the Emergency Motion of Defendants-Appellants to dissolve and vacate the injunction pending appeal, affidavit and brief in support and the Answer of Plaintiffs-Appellees to said Motion, and oral arguments having been heard by the Court and the Court being fully advised in the premises,

IT IS ORDERED that the said Emergency Motion to dissolve and vacate injunction pending appeal be and the same is hereby DENIED.

August 15, 1962.